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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 749

ELVERTON R. CHAPMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

Petition of Elverton R. Chapman for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

ELVERTON R. CHAPMAN,
Petitioner.

GEORGE F. EDMUNDS,
A. J. DITTENHOEFER,
JEREMIAH M. WILSON,
Attorneys for Petitioner.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. .....

ELVERTON R. CHAPMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

Petition of Elverton R. Chapman for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

To the Honorable the Supreme Court of the United States:

The petition of Elverton R. Chapman respectfully shows to this honorable Court as follows:

1. That he is a citizen of the United States and a resident of the city of New York, in the State of New York.

2. That heretofore, to wit, on the first day of October, 1894, in the supreme court of the District of Columbia, holding a criminal term, the grand jury impanelled in said court, at said term thereof, found, returned, and filed

in said court against your petitioner an indictment ostensibly based upon section 102 of the Revised Statutes of the United States.

3. That afterwards, to wit, on the eleventh day of October, 1894, your petitioner filed demurrer to said indictment, alleging, among other objections, the unconstitutionality of the acts of Congress upon which said indictment was founded; which said demurrer was thereafter, on the seventeenth day of November, 1894, by the court overruled, and your petitioner was ordered to plead to said indictment.

4. That afterwards, to wit, on the twenty-second day of November, 1894, the Court of Appeals of the District of Columbia allowed an appeal from said order overruling said demurrer, and thereafter, on the seventh day of January, 1895, said Court of Appeals affirmed the decision of the trial court, overruling said demurrer and requiring petitioner to plead to said indictment.

5. That thereupon and on, to wit, the twenty-second day of January, 1895, petitioner applied to this Court for leave to file a petition for writ of *habeas corpus*, basing said application upon substantially the facts above recited, and that thereafter and on, to wit, the fourth day of February, 1895, this Court denied said application, reference to which said decision is hereby made. (156 U. S., 211.)

6. Petitioner further says that thereafter he filed a petition in said Court of Appeals for writ of prohibition, to prevent the trial court from unlawfully assuming jurisdiction

to try petitioner upon and under said indictment, alleged to be based upon an act of Congress unconstitutional and void; which said petition was by said Court of Appeals denied, and from which action of said court petitioner thereupon duly prosecuted an appeal and writ of error to this Court, where the same is now pending, being numbered 291 on the docket of this Court, and reference to which is hereby made.

That petitioner thereafter filed motion in this Court to advance the hearing of said petition for prohibition, which motion was denied; and thereupon petitioner filed motion in this Court asking that it issue its mandate or order to the supreme court of the District of Columbia, holding said criminal term, directing it to suspend the further proceedings or trial of said case against your petitioner upon and under said indictment, as aforesaid, until said petition for prohibition was decided by this Court; which said motion was likewise denied by this Court.

7. That thereupon the trial of your petitioner upon and under said indictment was proceeded in, and on, to wit, the eighteenth day of January, 1896, the jury impanelled to try said cause returned a verdict of "guilty in manner and form as charged in the indictment" against your petitioner.

8. That thereupon, and within the time therefor limited, petitioner filed in said court motions in arrest of judgment and for new trial, alleging various errors occurring during the trial of said case prejudicial to the defendant, and fur-

ther alleging the unconstitutionality of the sections of the Revised Statutes upon which said indictment was founded.

9. That thereafter, on, to wit, the first day of February, 1896, the trial court overruled said motions and entered its judgment and sentence upon said verdict of the jury, as aforesaid, that petitioner be imprisoned in the jail of the District of Columbia for the period of one month from the date of arrival and pay a fine of one hundred dollars; whereupon petitioner noted an appeal to the said Court of Appeals from the judgment and sentence of said trial court.

10. That thereafter, petitioner having duly perfected his said appeal, the said Court of Appeals on, to wit, the seventh day of April, 1896, rendered its judgment affirming the judgment and sentence of the trial court.

11. That thereupon, on, to wit, the seventeenth day of April, 1896, upon application of petitioner, said Court of Appeals allowed a writ of error to remove said cause to this Court for review.

12. That thereafter petitioner duly perfected his said writ of error in this Court, where, however, the same was thereafter, on, to wit, the thirtieth day of November, 1896, upon motion made on behalf of the United States, dismissed for want of jurisdiction in this Court to review the decisions of the Court of Appeals of the District of Columbia in criminal cases. (*See* opinion dismissing writ of error.)

13. And petitioner further says that thereupon, being surrendered in open court by his bondsman, the said su-

preme court of the District of Columbia, holding said criminal term, committed your petitioner into the custody of said United States marshal in and for the District of Columbia, Albert A. Wilson, under the judgment and sentence of the court hereinabove referred to, and that thereupon and in pursuance and by virtue of said last-named order of commitment the United States marshal as aforesaid took your petitioner into his custody.

14. And petitioner further says that thereupon and on, to wit, the fourth day of January, A. D. 1897, he filed in this Court a petition for writs of *habeas corpus* and *certiorari*, alleging the unconstitutionality of the act of Congress upon and under which the said indictment was found against him and conviction had as aforesaid, said petition being known as original No. 11, October term, 1896, and which said petition is still pending in this Court undetermined.

15. A certified copy of the entire record of the said case in the said Court of Appeals of the District of Columbia is herewith furnished.

16. Your petitioner is advised and believes that the said judgment of the said Court of Appeals of the District of Columbia is erroneous, and that this honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the act of the Congress of the United States entitled "An act to au-
"thorize the Supreme Court of the United States to issue writs
"of certiorari to the Court of Appeals of the District of
"Columbia in the same cases and manner that it may do

"in respect of the circuit court of appeals," approved March 3, 1897, wherein it is provided "that in any case heretofore "made final in the Court of Appeals of the District of "Columbia it shall be competent for the Supreme Court to "require, by certiorari or otherwise, any such case to be "certified to the Supreme Court for its review and deter- "mination with the same power and authority in the case "as if it had been carried by appeal or writ of error to the "Supreme Court."

17. And your petitioner further shows that, as has been heretofore determined by this Court, he has no right of appeal or writ of error in this case, for the reason that this Court has no jurisdiction to review the decision of the Court of Appeals of the District of Columbia in criminal cases, except in the manner and as provided in said act of Congress approved March 3, 1897, *supra*.

18. As will appear from the record filed herewith, the following errors, among others, prejudicial to the defendant occurred during the trial of his said case and were thereafter affirmed by the said decision of the Court of Appeals of the District of Columbia, and which court therein failed and refused to apply and follow the principles heretofore laid down by this honorable Court.

(*a*.) The trial court erred in charging the jury as follows:

"There was some evidence given by Mr. Chapman that he made this refusal in good faith. That was admitted, not because it was considered by the court important for your consideration at all, but out of consideration for Mr. Chapman. I elected to permit him to say that he declined to

answer in good faith, but whether he did or not—whether he honestly believed that he had the right to decline—whether that belief was founded upon his judgment or upon the judgment of learned counsel—is not a matter for your consideration. You should not consider it. If Mr. Chapman declined to answer these questions or any of these questions, the law presumes that he then decided to take the consequences that might follow if his decision should turn out to be erroneous, or his belief should turn out to be erroneous. It would be a very dangerous doctrine that any citizen should decide for himself, either upon his own judgment or upon the advice of his lawyers, that a law enacted by Congress was void and need not be obeyed. That is what Mr. Chapman decided in this case."

(*b.*) The court erred in withdrawing from the jury the question whether the refusal to answer the questions set forth in the indictment was willful on the part of the defendant and in effect instructing the jury that it was not necessary for it to find that said refusal was, as a matter of fact, willful.

(*c.*) The court further erred in not requiring the prosecution to set forth in the indictment and to prove at the trial the facts and circumstances on which the Government would rely in its prosecution for the establishment of the averment in the indictment of willfulness on the part of the defendant in refusing to answer said several questions.

(*d.*) The court erred in instructing the jury in substance and effect that it need give no effect to the word "willful," as found in the statute under which said prosecution was had (section 102) and in the indictment.

(*c.*) The court erred in striking out of the indictment as surplusage and in excusing the prosecution from proving any and all matters set forth in the indictment which are not embraced within the matters enumerated by the court, in its charge to the jury, as those which the jury might consider, as requested by the Government, to wit, all those which do not relate to the question whether the defendant was summoned, whether he appeared, whether he was sworn, whether any one of the questions set forth in the indictment was put to him, and whether he declined to answer any one of them; and which matters, so stricken from the indictment and withdrawn from the consideration of the jury, include, amongst others, (*a*) the fact that a tariff bill was pending in the Senate at the time of the transaction as to which the committee was making inquiry; (*b*) that the defendant's refusal to answer the questions set forth in the indictment was willful; (*c*) all evidence as to the non-action of the Senate touching the report of said committee to the Senate of the defendant's refusal to answer questions put to him by said committee, including the non-action of the Senate upon the matter of the pertinency of said questions, answers to which were so refused, also as to the non-action of the Senate as to the matter of authorizing its seal to be fixed to the certificate sent to the district attorney, and also as to all other matters relating to said report of the committee and this prosecution; (*d*) that the sugar stocks named in the indictment became greatly impaired and lessened in value by reason of the passage by the House of Representatives of the tariff measure usually known as the "Wilson bill;" (*e*) that said stocks were enhanced in value by reason of the recommending of amendments to said tariff bill by the

Finance Committee of the Senate; (*f*) that said stocks became still further enhanced in value in consequence of the submission of what are known as the Jones amendments, and (*g*) all evidence in regard to the averments contained in the various innuendos set forth in the indictment, and in regard to the averments contained in the "whereases" prefacing the resolutions of the Senate quoted and set forth in said indictment.

(*f.*) That the court erred in refusing to dismiss the prosecution on motion of defendant for want of jurisdiction; *first*, because the subject-matter is not one which said court is lawfully authorized to try, and, *second*, because it does not appear that the jurisdiction of said court was ever lawfully invoked in respect of the transmission of the papers by the Senate to the district attorney.

(*g.*) The indictment under which defendant was tried contained, in the same and a single count, the charge that the defendant willfully refused to answer five separate, different, and distinct questions as in said indictment set forth, each refusal constituting, according to the charge given by the court to the jury and the contention of the prosecution, a separate and independent misdemeanor, complete in itself, without regard to the four other alleged refusals. Wherefore said indictment was and is bad in substance, and the court erred in refusing to arrest the judgment on that ground.

(*h.*) The court erred in overruling the motion in arrest of judgment filed on behalf of the defendant.

(*i.*) The provisions of sections 102, 103, and 104 of the Revised Statutes of the United States are unconstitutional and void, and the court erred in refusing to arrest the judgment in said case upon said ground.

19. And your petitioner further shows that the questions and each of them put to your petitioner and set forth in said indictment and which your petitioner declined to answer were questions in regard to the lawful private business of your petitioner, which he was not bound to answer and which he was protected from making answer to because attempting to make an unreasonable and unlawful search into the private affairs of your petitioner, in contravention of the provisions of the fourth amendment to the Constitution of the United States and of the other provisions of the Constitution and laws of the United States protective of personal rights and liberty, and which questions the resolution of the Senate, set forth in said indictment, under which the investigating committee received whatever authority it had in the premises to make investigations and to ask questions, did not authorize or empower said committee to ask or compel answers to.

20. And your petitioner further shows that the conditions under which the said questions set forth in said indictment were asked of your petitioner and which he declined to answer, and all the other conditions herein named, were not such as authorized the said committee to make said search into the private affairs of your petitioner, nor were they such as authorized or permitted the Senate of the United States to demand or compel answers thereto, disclosing the

private affairs of your petitioner; this because, owing to the very limited jurisdiction of the Senate in matters of judicial cognizance, the Senate is without power or jurisdiction to institute or compel inquiry into such private affairs, except where such inquiry is prosecuted in aid of the exercise and execution of some one or more of the judicial functions of the Senate, and the facts disclosed by the record, hereinabove set forth, fail to show that said investigation was instituted and prosecuted for any such purpose, but show the opposite.

Owing to and in view of the matters and conditions set forth in this and the preceding paragraph, the refusal of your petitioner to answer the questions set forth in said indictment is not a misdemeanor within the purview and true intent and meaning of said section 102 of the Revised Statutes, that section not being designed to, nor could it, compel unwilling answers to questions which the committee was prohibited from asking or enforcing answers to by the principles of the Constitution and laws of the United States.

21. Petitioner further says that section 102 of the Revised Statutes, under which this indictment was brought, is unconstitutional and void, because it is an attempt on the part of Congress to abdicate the functions, powers, and jurisdiction, bestowed by the Constitution on the Houses thereof respectively, to punish contempt of their authority, and is an attempt to transfer the power to punish acts constituting contempt of the Houses respectively to the exclusive discretion and jurisdiction of the criminal court of the District of Columbia.

22. Petitioner further says that if said section 102 should receive the interpretation of not being designed to transfer to the criminal court of the District of Columbia the exclusive jurisdiction of the Houses of Congress to punish acts which amount to contempt of their authority, but as being designed to leave in the Houses the power to punish such acts, and to add to such power to punish for contempt the power and jurisdiction in the criminal court of this District to punish the same acts as misdemeanors, then said section 102, for this additional reason, is unconstitutional and void, as being in contravention of the fifth amendment to the Constitution of the United States.

Section 102, under which your petitioner is indicted, is unconstitutional and void for the additional reason that it is inseparably connected with the provisions of section 103, and is, along with said section 103, a part of the single and indivisible scheme embraced in the act of January 24, 1857. The provisions of section 102 cannot, therefore, be enforced in disregard of the provisions of section 103 consistently with the intention of Congress; and if section 103 is not capable of being executed because unconstitutional and void, then neither can section 102 be executed, because "if "a clause in a statute which violates the Constitution can- "not be rejected without causing the statute to enact what "the legislature never intended, the whole statute must "fail."

The compulsory requirements of this statute of 1857, taken as a whole, and its definition of a misdemeanor combine in one mass or without discrimination two classes of testimony, one being of a kind that the witness ought to

give, and the other being one which the Constitution, in its fifth amendment, says he shall not be compelled to give. In such case the judiciary cannot supply exceptions which the statute does not make, and enforce the delivery of the class of testimony which the witness can lawfully be required to give, and leave out that class which he cannot be required to give, but which comes equally within the statute.

Section 103 is clearly unconstitutional, because it compels involuntary answers to questions put by committees of either House of Congress, although the witness may decline to answer on the ground that his testimony in answer to such questions, or his production of papers, may tend to disgrace him or otherwise render him infamous.

23. And petitioner further says that the judgment and decision herein, so far as the same affects the question of the " willfulness " of petitioner's refusal to answer questions put to him by the said committee of the Senate, is in direct conflict with the principles enunciated by this honorable Court in the case of *Potter vs. United States* (155 U. S., 438); but the said supreme court of the District of Columbia and the said Court of Appeals of said District failed and refused to apply and follow the principles so laid down by this honorable Court, and which principles, it is submitted, are peculiarly applicable to the facts of your petitioner's case.

24. Your petitioner respectfully submits that the questions presented by this record should be authoritatively and finally adjudged by this honorable Court upon and after a

full presentation to the Court of the merits thereof. The case is one of the utmost gravity and importance, not only to your petitioner, but to every citizen in the land, involving, as it does, personal rights and privileges guaranteed by the Constitution of the United States, and hence it is of the highest importance that the highest court in the land shall adjudge the questions involved in this case, and thus lay down an authoritative and sound rule for the guidance of the Houses of Congress, its committees, the courts, and citizens, in cases of a similar nature.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Appeals of the District of Columbia, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court of Appeals of the District of Columbia in the said case therein entitled "Elverton R. Chapman, appellant, *vs.* The United States," No. 550, April term, 1896, to the end that the said case may be reviewed and determined by this Court as provided in the act of Congress entitled "An act to authorize the Supreme Court of the "United States to issue writs of certiorari to the Court of "Appeals of the District of Columbia in the same cases and "manner that it may do in respect of the circuit court of "appeals," approved March 3, 1897, and that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said judgment of the said Court of Appeals of the District of Columbia in

said case and every part thereof may be reversed by this honorable Court.

And your petitioner will ever pray, &c.

ELVERTON R. CHAPMAN,
Petitioner.

GEORGE F. EDMUNDS,
A. J. DITTENHOEFER,
JEREMIAH M. WILSON,
Attorneys for Petitioner.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Elverton R. Chapman, being duly sworn, on oath says that he is the petitioner in the foregoing petition by him subscribed; that he has read the same, and that the facts therein stated are true to the best of his information and belief.

ELVERTON R. CHAPMAN.

Subscribed and sworn to before me this twelfth day of March, A. D. 1897.

[SEAL.] LEOPOLD WOODLE,
Notary Public, N. Y. Co.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1896.

ELVERTON R. CHAPMAN, *Plaintiff in Error,*
vs.
THE UNITED STATES. } No. —.

To the Honorable the Attorney General of the United States.

SIR: Please take notice that on Monday, the 22d day of March, A. D. 1897, at the opening of the Court, or as soon

thereafter as counsel can be heard, the petition, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of said Court thereon.

GEORGE F. EDMUNDS,
A. J. DITTENHOEFER,
JEREMIAH M. WILSON,
Attorneys for Petitioner.

Service of a copy of the above notice, and also of the petition for writ of certiorari, received this 15 day of March, 1897, acknowledged.

Joseph McKenna

Attorney General of the United States.

166-721

749

MAR 15 1897
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

ELVERTON R. CHAPMAN,
Plaintiff in Error,

vs.

THE UNITED STATES.

Brief in Support of Petition of Elverton R. Chapman for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

GEORGE F. EDMUNDS,
J. W. WILSON,
A. J. DITTENHOEFER,
Of Counsel for the Petitioner.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

No. .

ELVERTON R. CHAPMAN,
Plaintiff in Error,

vs.

THE UNITED STATES.

Brief in support of petition of Elverton R. Chapman for a writ of certiorari to the Court of Appeals of the District of Columbia.

STATEMENT OF FACTS.

This is an application for a writ of *certiorari* to the Court of Appeals of the District of Columbia, under the provisions of the Act of Congress of March 3, 1897.

The petitioner, Elverton R. Chapman, a resident of the city and State of New York, was, on the 1st of October, 1894, indicted by the grand jury of the District of Columbia. This indictment purports to be for a violation of section 102 of the Revised Statutes of the United States, making it a misdemeanor for a witness "summoned by the authority of either House of Congress" to testify before such House, or any committee

thereof, "to wilfully make default," or who, having appeared, "refuses to answer any question pertinent to the matter under inquiry."

The petitioner, during the month of June, 1894, was summoned to testify before a Special Committee of the Senate appointed to investigate charges of bribery, etc., sitting at Washington, and, having appeared, refused to answer certain questions that were put to him by said Committee relating to the operations of United States Senators in sugar stocks through the firm of Moore & Schley, of which the said Chapman was a member, during certain specified months, and while what is known as the Wilson tariff bill was pending in the Senate. The defendant having demurred to the said indictment, and said demurrer having been overruled, an appeal was taken to the Court of Appeals of the District of Columbia, and, on the 7th of January, 1895, the decision and order of the court below overruling said demurrer was affirmed, and the defendant ordered to plead.

On the 3d of January, 1896, the defendant was arraigned in the Supreme Court of the District of Columbia, holding a criminal term, and entered a plea of not guilty. The trial of said case was commenced in said court on the 6th of January, 1896, and concluded upon the 18th day of the same month, upon which day the jury rendered its verdict of guilty as indicted. Thereupon motions for a new trial and in arrest of judgment were submitted, argued by counsel and overruled by the court *(R., pp. 16–22)*, the defendant being adjudged and sentenced to pay a fine of $100 and to imprisonment in the jail of the District of Columbia for one month *(R., p. 23)*, from which judgment an appeal was duly taken to said Court of Appeals.

Thereafter, petitioner having duly perfected his said appeal, the said Court of Appeals, on, to wit, the seventh day of April, 1896, rendered its judgment, affirming the judgment and sentence of the trial court.

Thereupon, on, to wit, the seventeenth day of April, 1896, upon application of petitioner, said Court of Appeals allowed a writ of error to remove said cause to this court for review.

Thereafter, petitioner duly perfected his said writ of error in this court, where, however, the same was, thereafter, on, to wit, the thirtieth day of November, 1896, upon motion made on behalf of the United States, dismissed for want of jurisdiction in this court to review the decisions of the Court of Appeals of the District of Columbia, in criminal cases. (See, opinion, dismissing writ of error.)

The petitioner, feeling that great injustice has been done him by the erroneous decision herein, and believing that the questions of law involved in the case are of sufficient gravity and importance to warrant the review of said cause by the Supreme Court of the United States, has prayed that this honorable Court should require the said cause to be certified to it for its review and determination and in conformity with the provisions of an act of the Congress of the United States, entitled "An Act to authorize the Supreme "Court of the United States to issue writs of *certi-* "*orari* to the Court of Appeals of the District of "Columbia in the same cases and manner that it may "do in respect of the circuit court of appeals," the said cause being made final in the said Court of Appeals of the District of Columbia, because, as heretofore decided, this court is without power (aside from said Act last referred to) to review the decisions of said Court of Appeals in criminal cases.

Assignment of Errors.

1. The trial court erred in charging the jury as follows :

"There was some evidence given by Mr. Chapman that he made this refusal in good faith. *That was admitted, not because it was considered by the court impor-*

tant for your consideration at all, but out of consideration for Mr. Chapman. I elected to permit him to say that he declined to answer in good faith; but, whether he did or not—whether he honestly believed that he had the right to decline—whether that belief was founded upon his judgment or upon the judgment of learned counsel, is not a matter for your consideration. You should not consider it. If Mr. Chapman declined to answer these questions, or any of these questions, the law presumes that he then decided to take the consequences that might follow if his decision should turn out to be erroneous, or his belief should turn out to be erroneous. *It would be a very dangerous doctrine that any citizen should decide for himself, either upon his own judgment or upon the advice of his lawyers, that a law enacted by Congress was void and need not be obeyed. That is what Mr. Chapman decided in this case.*"

2. The court erred in withdrawing from the jury the question whether the refusal to answer the questions set forth in the indictment was wilful on the part of the defendant, and, in effect, instructing the jury that it was not necessary for it to find that said refusal was, as a matter of fact, wilful.

3. The court further erred in not requiring the prosecution to set forth in the indictment, and to prove at the trial, the facts and circumstances on which the Government would rely, in its prosecution, for the establishment of the averment in the indictment of "wilfulness" on the part of the defendant in refusing to answer said several questions.

4. The court erred in instructing the jury, in substance and effect, that it need give no effect to the word "wilful" as found in the statute under which said prosecution was had (sec. 102) and in the indictment.

5. The jury having retired to consider of their verdict, thereafter returned into court and propounded the following question to the court:

"Is the admission by the defendant that the questions as set forth in the indictment were substantially

the same, equivalent to an admission by him that they were the same, and can the jury act upon that hypothesis ?"

and, thereupon, the court erred in replying to said question, so propounded by the jury, and in instructing the jury as follows :

"I answer that in the affirmative. If you find, from the evidence, that the defendant himself upon the stand admitted that the questions put to him, and which he declined to answer before the Committee, were substantially the same as those set forth in the indictment, that is sufficient to prove that they are the same."

The indictment under which defendant was arraigned and tried undertakes to set forth each question put to the witness by the said Senate Committee according to its "tenor," and it was error in the court to instruct the jury that it was sufficient if they found from the evidence that the questions actually put to the defendant by said Committee were *substantially* the same as those set forth in the indictment.

6. The court erred in striking out of the indictment, as surplusage, and in excusing the prosecution from proving, any and all matters set forth in the indictment which are not embraced within the matters enumerated by the court, in its charge to the jury, as those which the jury might consider, as requested by the Government *(R., pp. 52, 58–59)*, to wit, all those which do not relate to the question whether the defendant was summoned, whether he appeared, whether he was sworn, whether any one of the questions set forth in the indictment was put to him, and whether he declined to answer any one of them; and which matters, so stricken from indictment and withdrawn from the consideration of the jury, include, amongst others, *(a)* the fact that a tariff bill was pending in the Senate at the time of the transactions as to which the Committee was

making inquiry; *(b)* that the defendant's refusal to answer the questions set forth in the indictment was wilful; *(c)* all evidence as to the nonaction of the Senate touching the report of said Committee to the Senate of the defendant's refusal to answer questions put to him by said Committee, including the nonaction of the Senate upon the matter of the pertinency of said questions, answers to which were so refused, also as to the nonaction of the Senate as to the matter of authorizing its seal to be affixed to the certificate sent to the District Attorney, and also as to all other matters relating to said report of the Committee and this prosecution; *(d)* that the sugar stocks named in the indictment became greatly impaired and lessened in value by reason of the passage, by the House of Representatives, of the tariff measure usually known as the "Wilson bill;" *(e)* that said stocks were enhanced in value by reason of the recommending of amendments to said tariff bill by the Finance Committee of the Senate; *(f)* that said stocks became still further enhanced in value in consequence of the submission of what are known as the Jones amendments, and *(g)* all evidence in regard to the averments contained in the various innuendoes set forth in the indictment, and in regard to the averments contained in the "whereases" prefacing the resolutions of the Senate quoted and set forth in said indictment.

7. The court erred in refusing to dismiss the prosecution, on motion of defendant, for the want of jurisdiction, first, because the subject matter is not one which said court is lawfully authorized to try; and second, because it does not appear that the jurisdiction of said court was ever lawfully invoked in respect to the transmission of the papers by the Senate to the District Attorney.

8. The indictment under which defendant was tried contains, in the same and a single count, the charge

that the defendant wilfully refused to answer five separate, different and distinct questions, as in said indictment set forth, each refusal constituting, according to the charge given by the court to the jury, and the contention of the prosecution, a separate and independent misdemeanor, complete in itself, without regard to the four other alleged refusals; wherefore said indictment was and is bad in substance, and the court erred in refusing to arrest judgment on that ground.

9. The court erred in overruling the motion in arrest of judgment, filed on behalf of the defendant.

10. The provisions of sections 102, 103 and 104 of the Revised Statutes of the United States are unconstitutional and void, and the court erred in refusing to arrest the judgment in said case upon said grounds.

11. That the questions, and each of them, put to your petitioner and set forth in said indictment, and which your petitioner declined to answer, were questions in regard to the lawful private business of your petitioner, which he was not bound to answer, and which he was protected from making answer to because attempting to make an unreasonable and unlawful search into the private affairs of your petitioner, in contravention of the provisions of the Fourth Amendment to the Constitution of the United States, and of the other provisions of the Constitution and laws of the United States protective of personal rights and liberty; and which questions the resolution of the Senate, set forth in said indictment, under which the investigating committee received whatever authority it had in the premises to make investigations and to ask questions, did not authorize or empower said committee to ask or compel answers to.

12. That the conditions under which the said questions set forth in said indictment were asked of your petitioner, and which he declined to answer, and all the other

conditions herein named, were not such as authorized the said committee to make said search into the private affairs of your petitioner, nor were they such as authorized or permitted the Senate of the United States to demand or compel answers thereto disclosing the private business of your petitioner; this because, owing to the very limited jurisdiction of the Senate in matters of judicial cognizance, the Senate is without power or jurisdiction to institute or compel inquiry into such private affairs, except where such inquiry is prosecuted in aid of the exercise and execution of some one or more of the judicial functions of the Senate; and the facts disclosed by the Record, hereinabove set forth, fail to show that said investigation was instituted and prosecuted for any such purpose, but show the opposite.

13. Owing to, and in view of, the matters and conditions set forth in the two preceding paragraphs, the refusal of your petitioner to answer the questions set forth in said indictment is not a misdemeanor within the purview and true intent and meaning of said section 102 of the Revised Statutes; that section not being designed to, nor could it, compel unwilling answers to questions which the committee was prohibited from asking, or enforcing answers to, by the principles of the Constitution and laws of the United States.

14. Section 102 of the Revised Statutes of the United States, under which this indictment was brought, is unconstitutional and void, because it is an attempt, on the part of Congress, to abdicate the functions, powers, and jurisdiction bestowed by the Constitution on the Houses thereof, respectively, to punish contempt of their authority, and is an attempt to transfer the power to punish acts constituting contempt of the Houses respectively to the exclusive discretion and jurisdiction of the Criminal Court of the District of Columbia.

15. If said section 102 should receive the interpretation of not being designed to transfer to the Criminal Court

of the District of Columbia the exclusive jurisdiction of the Houses of Congress to punish acts which amount to a contempt of their authority, but as being designed to leave in the Houses the power to punish such acts, and to *add* to such power to punish for contempt the power and jurisdiction in the Criminal Court of this District to punish the *same acts as misdemeanors*, then said section 102, for this additional reason, is unconstitutional and void, as being in contravention of the Fifth Amendment of the Constitution of the United States.

Section 102, under which your petitioner is indicted, is unconstitutional and void for the additional reason that it is inseparably connected with the provisions of section 103, and is, along with said section 103, a part of the single and indivisible scheme embraced in the act of January 24, 1857. The provisions of section 102, can not, therefore, be enforced in disregard of the provisions of section 103 consistently with the intention of Congress, and if section 103 is not capable of being executed because unconstitutional and void, then neither can section 102 be executed, because, " if a clause in a " statute which violates the Constitution can not be " rejected without causing the statute to enact what the " legislature never intended, the whole statute must " fail."

The compulsory requirements of this statute of 1857, taken as a whole, and its definition of a misdemeanor, combine in one mass and without discrimination two classes of testimony, one being of a kind that the witness ought to give, and the other being one which the Constitution, in its Fifth Amendment, says he shall not be compelled to give. In such case the judiciary can not supply exceptions which the statute does not make, and enforce the delivery of the class of testimony which the witness can lawfully be required to give, and leave out that class which he can not be required to give, but which comes equally within the statute.

16. Section 103 is clearly unconstitutional, because it compels involuntary answers to questions put by

committees of either House of Congress, although the witness may decline to answer on the ground that his testimony in answer to such questions or his production of papers may tend to disgrace him or otherwise render him infamous.

BRIEF.

I.

Jurisdiction.

At the time of the transactions set forth in the indictment, before and ever since, there existed a standing rule of the Senate, which reads as follows:

"*Resolved*, That the secretary shall have the custody of the seal, and shall use the same for the authentication of process, transcripts, copies, and *certificates whenever directed by the Senate*; and may use the same to authenticate copies of such papers and documents in his office as he may lawfully give copies of."

(See *Senate Journal, 1st sess., 49th Cong., p. 194.*)

The effect of this rule is expressly and clearly to make it incompetent for the custodian of the seal of the Senate, or any other person or officer thereof, to attach said seal to such a certificate as that which is contemplated and provided for in section 104 of the Revised Statutes.

At the trial below the defendant offered to prove and to introduce in evidence this rule of the Senate; whereupon the District Attorney objected, expressly admitting, however, that the Senate never took any action upon the report of the Investigating Committee; but the District Attorney objected to its admission in evidence on the ground that it was immaterial and irrele-

vant, which objection was sustained by the court, to which ruling the defendant, by his counsel, then and there duly excepted. *(R., p. 45.)*

The above admission by the District Attorney that the Senate never took *any* action on the report, embraces and includes an admission that the Senate never authorized its seal to be used for the purpose of authenticating the certificate that was forwarded to the District Attorney (as the Senate in fact never did)—never took any action in regard to the "pertinency," relevancy or materiality of the questions which are set forth in the indictment as those which the defendant refused to answer—never authorized the President of the Senate to certify the fact of said refusal to the District Attorney, and never took any action whatever in regard to said report, all of which is duly preserved as matter of exception to the rulings of the court below.

The question of law which these undisputed and expressly admitted facts raises, is whether, in the absence of any and all action by the Senate, including its non-action as to ordering the certificate to be sealed, it became and was, under said section 104, competent for the President of the Senate, under the seal of the Senate, to certify the said matters to the District Attorney which are embraced in said statute, and whether, in the absence of such action by the Senate, it was within the power and jurisdiction of the prosecutor to submit said matter to the grand jury for indictment.

There is not in existence a *direct* decision upon this question, and there could not be, because no such prosecution as that instituted in this case is provided for anywhere except in this statute, and under this statute no prosecution but the present has ever taken place. We are, therefore, left to the general principles of law most nearly analogous to the present matter for the ascertainment of a correct view of this question of jurisdiction.

Resorting to these general principles, it seems to us to be quite plain that, in the case above put, there was no jurisdiction in the grand jury to find this indictment.

It is one of the most beneficent and thoroughly settled rules, for the interpretation of statutes, that they shall never receive an interpretation which would result in injustice or absurdity, when such an interpretation can, consistently with the words of the statute, be avoided.

On this proposition the language of the Supreme Court of the United States, in the case of *Carlisle* v. *United States* (16 Wall., 153), is as follows:

"It is not to be supposed that Congress intended, by the general language of the act, *to encroach upon any of the prerogatives of the President*, and especially that benign prerogative of mercy which lies in the pardoning power. It is more reasonable to conclude that claimants, restored to their rights of property by the pardon of the President, were not in contemplation of Congress in passing the act and were not intended to be embraced by the requirement in question. *All general terms in statutes should be limited in their application, so as not to lead to injustice, oppression or any unconstitutional operation*, if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature."

Citing—

United States v. *Kirby*, 7 Wall., 482.

See also—

Oats v. *National Bank*, 100 U. S., 244;
Com. v. *Kimball*, 124 Pick., 370;
Chew Heong v. *United States*, 112 U. S., 555;
Railroad v. *Roach*, 80 N. Y., 389.

This is a very familiar, but also a very important, rule of interpretation, and, when applied to the present case, results in the establishment of the following propositions:

1. That, in providing that the President of the Senate shall certify the refusal of the recusant witness

to answer to the District Attorney, under the seal of the Senate, it is not intended by section 104 to deprive the Senate of its constitutionally-conferred discretions in the matter of the use of its seal. Indeed, it is not possible for the two Houses of Congress, together, to deprive either House of any of the discretions which are bestowed by the Constitution upon the Houses separately and respectively.

Article I, section 5, of the Constitution expressly authorizes each House to determine the rules of its proceedings, etc. Under this power the Senate makes its rules. One of these rules is that above quoted, in regard to the use of its seal, and in regard to who shall determine when and where it shall be used. This is, therefore, a constitutionally-conferred power.

In regard to the power of Congress to interfere with these rules, and with proceedings thereunder, by general law, the late Justice Miller, in his work on the Constitution, speaking of the power of the Houses to decide contested elections, says (page 193):

"As this is a constitutional provision, however, there exists no power in the Legislature, without an amendment of that instrument, to refer those contested election cases to the judiciary."

Self-evidently is this true of *every other separate function* of the respective Houses of Congress conferred by the Constitution. It is totally beyond the power of the Legislature to interfere with the discretion of the Senate in regard to the requirements and enforcement of its rules. Consequently, when section 104 of the Revised Statutes authorizes or requires the President of the Senate, under its seal, to certify refusals of recusant witnesses to answer questions put by one of its committees, it means that he shall do this subject and pursuant to the directions of the Senate. Any other construction of this statute would render it nugatory and void as an attempt by Congress to encroach upon the separate and constitutionally-conferred functions of the Senate.

The position that Congress may undertake, by law, to dictate how the Senate shall exercise the discretionary powers conferred upon it by the Constitution, is so plainly absurd as to make it unnecessary further to consider the subject. Therefore, when the President of the Senate sealed the certificate forwarded in this case to the District Attorney, without, as required by the above-quoted rule, being ordered to do so by the Senate, he did an act that was absolutely void and nugatory. Section 104, properly construed, did not intend to give the President of the Senate the power to ignore or defy the wishes or votes of the Senate in regard to the certification of any paper whatever.

Again, this statute can not rationally be construed as one which negatives or vacates the power of the Senate to punish, as contempt of its authority, the same acts that are defined as a misdemeanor in section 102 of the Revised Statutes. If the statute does so intend, it is plainly unconstitutional, for the reasons just stated, to wit, that Congress can not impair or destroy the separate and independent functions conferred by the Constitution upon the Houses respectively.

Giving this statute a reasonable construction, it must mean that the Senate must act upon the matter of certifying the case to the District Attorney—that it must act *(1)* upon the question whether the offense of the witness is of sufficient gravity to justify a prosecution in the courts of the District of Columbia; *(2)* upon the matter of the pertinency of the questions, answers to which are refused; *(3)* upon the matter of the wilfulness of the refusal, and *(4)* that the certificate *may be so timed* as that it will not impair the power and right of the Senate *itself* to punish the delinquent witness for contempt should it decide so to do.

Any construction of this statute which would deprive the Senate of the presence of the witness for the purposes of testifying before a committee, or for the purpose of *itself* punishing him for contempt, would result

in the impossibility of the act of so certifying his refusal to answer being held to be valid.

From the considerations just stated, the following must inevitably result :

1. That, in this case, there has been no decision by the Senate that the refusals to answer set forth in the indictment *were of such importance* as to justify a prosecution therefor.

2. That there has been no decision by the Senate that the questions set forth in the indictment were *pertinent* to the matter under inquiry by the Committee, the determination of this being a purely political question, to be decided by the Senate, and not within the powers that can be transferred for decision to the courts ; and

3. There has been no decision by the Senate that the refusals to answer were *wilful*.

In the light of all the authorities, we respectfully submit that it is settled that where a statutory proceeding, unknown to the common law, is authorized, aiming either to divest the citizen of his property or of his liberty, there the steps prescribed by the statute as those to be taken prior to the submission of the case to the courts, become and are jurisdictional, and conditions precedent to the exercise of the power or authority by which the divestiture of the property or the deprivation of liberty is to be accomplished.

II.

Wilfully.

We now come to a statement of our legal propositions, and authorities in support thereof, in regard to the holding of the court below, touching the effect of the use of the word "wilfully" in section 102 of the Revised Statutes of the United States, under which this indictment is prosecuted. The language of this section is as follows:

"Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any Committee of either House of Congress, *wilfully* makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months."

The indictment charges that the refusal of the defendant to answer the questions therein set forth was "wilful." In excluding all evidence tending to show his good faith in refusing to answer said questions, the court, although it held that the word "wilful" is implied and should be inserted before the words "refuse to answer," in the above quoted statutes, further held as follows:

(a) Notwithstanding the fact that the court permitted the defendant, in his own behalf, to testify that he refused to answer in good faith, that evidence was admitted, not because it was thought by the court to be a proper subject for consideration by the jury, but because he thought it only fair to Mr. Chapman to allow him to state it.

(b) The court further expressly instructed the jury that it had absolutely nothing to do with the question of good faith of the defendant in declining to answer.

The instruction to the jury that what the defendant decided, in refusing to answer said questions, was that the law under which he was indicted was void, and that, therefore, he need not obey it, was inaccurate as a matter of fact, and thus calculated to mislead the jury to the prejudice of the defendant. The defendant did not refuse to answer because he or his counsel decided that the said statute was invalid; but he based said refusal upon the belief and contention that the questions which he declined to answer involved an "unreasonable search" into his private and confidential business, and were, *therefore*, unconstitutional, and that he was, by the Constitution and law, protected from being required to make the disclosures demanded by said questions, just as the Supreme Court of the United States held that Mr. Kilbourn was protected from being required to answer, in the case of *Kilbourn* v. *Thompson* (103 U. S., 168), and just as, in the case of *Counselman* v. *Hitchcock* (142 U. S., 547), Counselman was held not to be required to answer the questions put to him in that case by the grand jury.

The court further ruled and held, during the progress of the trial, and in deciding upon the admissibility of testimony, the following:

(a) That the presence of the word "wilfully" in the statute under which this indictment is prosecuted is wholly without signification or legal effect as to the operation of the statute; that although, under a true construction of the statute, said word is implied and should be inserted before the words "refuse to answer," yet with said words inserted, and with the word in the statute as it reads, the said statute means no more, and its force and effect is the same, as if the word were entirely omitted.

(b) In pursuance of these views, the Court excluded from the jury the consideration of all testimony going to show that the defendant believed that he was protected from being required to answer by the Fourth Amendment to the Constitution on the ground that such a requirement was an unreasonable search into his private and confidential business.

(c) The court withdrew from the jury the consideration of all testimony tending to show that the defendant, in refusing to answer, acted under the advice of counsel, taken, given, and acted on in entire good faith, and upon and after diligent endeavor to ascertain what the legal rights and obligations of the defendant were in regard to the matter of making said answers.

(d) The court further deprived the defendant of the benefit of all testimony tending to show that it was at least doubtful, under the then state and condition of the law, whether the defendant was not, by the force of said Fourth Amendment and the other provisions of law, justified in refusing to answer said questions, and protected from being required to make answer thereto.

(e) The court further ruled that, in order to convict the defendant, it was not necessary to show any bad or evil intent or purpose, on his part, in so refusing to answer.

(f) The court further ruled, and held, that all that was necessary to a conviction, depending upon the purpose or intent with which the refusal was made, was that the defendant should know that the words of the statute required him to answer any and all questions pertinent to the matter under inquiry, and that this knowledge was presumed and need not be proved.

(g) The court further held and ruled that this statute in order to convict, required no proof of guilty intent of

any kind—that the defendant's *intention* was wholly immaterial and foreign to the matter involved in the prosecution.

(h) That the use of the word "wilfully" in said statute did not make the defendant's intention, or state of mind, in so refusing to answer, an element entering into the misdemeanor.

Such, in legal effect and substance, were the rulings of the court below upon this vital question in the case, as to the force and effect of the word "wilfully" in the statute, and as to the question whether, under the provisions of the Constitution and law which prohibit unreasonable searches into the private affairs of the citizen, the defendant was not justified in refusing to answer. (See Justice Field's opinion, *in re Pacific Ry. Com.*, 32 Fed. Rep., 255; *Brimson's Case*, 154 U. S., 479.)

The proofs which were tendered by the defendant, showed that, in the whole matter of such refusal, the defendant acted in the utmost and absolute good faith; that he made *bona fide* and diligent efforts to find out what the law required of him as to such disclosures of his private affairs as were demanded by the questions which he refused to answer; that he took the advice of his counsel in that regard; that he, in good faith, acted on the honest belief that the said statute did not require him to disclose the private and confidential business demanded by said questions; that the making, by him, of answer to said questions would be a gross violation of *lawful* confidences reposed in him and in his partners by his clients and customers in the conduct of perfectly lawful business, and that such disclosures would not only be dishonorable, but ruinous to the business of defendant and his firm.

All this evidence, so tendered, was by the court totally withheld from the consideration of the jury, and the jury instructed not to regard it, although the court had permitted the defendant himself to testify to sub-

stantially what has just been stated as to his diligence and good faith.

That this exclusion of testimony was erroneous, we submit, with great deference and respect, hardly admits of doubt or useful debate.

There are two grounds upon which evidence of this character is admissible under the law, and which we now proceed to state. As they are kindred and run into each other, we will present the authorities supporting them together.

1. One of these grounds is stated by Bishop in the last edition (the 2d) of his work on Statutory Crimes, sections 822 and 823, where, speaking of an erroneous view that was put forward in the preceding section, the author says:

"This view seems to overlook the *familiar principle, that when a particular condition of the mind is an element of an offense, the lack of it, produced by a mistake of law, is as available to the defendant as if it were from any other cause.*" *(Citing, Crim. Law, I, sections 297–9.)*

So that—

"Where, in Rhode Island, a statute made punishable one who should 'fraudulently vote, not being qualified,' it is held that a voter who knows the facts, and, believing them to qualify him, while they do not, casts illegally, yet with an honest purpose, his vote, *does not commit the offense.*"

Citing—

State v. *Macomber*, 7 R. I., 349-353.

In sections 297 to 299, of 1 Bishop's (New) Criminal Law, pp. 169-171, this principle is stated in these words:

"297. There are crimes which cannot be committed of general malevolence, but they require a *particular evil condition of the mind*, existing in actual fact. And ignorance of the law, the same as any other cause, if it renders the special state of mind impossible, takes away the offense. Thus *larceny* exists only where there is an *intent to steal. And an indispensable element in this*

intent is the knowledge that the property taken does not belong to the taker. Therefore, if all the facts concerning the title are known to him, and so the question is simply of law whether or not the property is his, still he may show, and it will be adequate in defense, that he honestly believed it his through misapprehending the law." (Citing *Rex* v. *Hall*, 3 Car. & P., 409; *Reg.* v. *Reed*, Car. & M., 306; *C.* v. *Doane*, 1 Cush., 5; *S.* v. *Homes*, 17 Mo., 379; *P.* v. *Husband*, *36 Mich.*, 306; *Evans* v. *S.*, 15 Tex. App., 31.)

2. The other ground upon which evidence of the character above indicated is admissible is stated in another and kindred class of cases, which forbid the exclusion of the testimony bearing upon the matter of the "wilfulness" of the defendant's refusal to answer the questions set forth in the indictment, which was excluded by the court below, and is where the state of the law, on which the prosecution is based, is unsettled, or obscure, or complicated, or doubtful.

In the head notes to the case of *Cutler* v. *The State* (36 New Jersey Law, 193), this ground is stated as follows:

"1. The mere taking of an illegal fee by a justice of the peace or other officer of this State, will not constitute a criminal act under the 28th section of the act for the punishment of crimes, without regard to the intent of the recipient.

"2. The legal maxim *ignorantia legis criminem excusat*, if enforced where the law is not settled, or obscure, and where the guilty intention, being a necessary constituent of the particular offense, is dependent on a knowledge of the law, would be misapplied.

"3. The defendant, on an indictment for extortion in taking fees to which he was not entitled, has the right to prove to the jury that the money which it is charged he took extorsively were received by him under a mistake as to his legal rights."

The opinion in this case is by Chief Justice Beasley and on page 126 (36 N. J. Law), the court states as follows:

"On the part of the State, it is argued that this statute is explicit in its terms, and *makes the mere taking of an illegal fee a criminal act without regard to the intent of the recipient.* Such, undoubtedly, is the *literal* force of the language; but then, on the same principle, the officer would be guilty if he took, by mistake or inadvertence, more than the sum coming to him. Nor would the statutory terms, if taken in their exact signification, exclude from their compass an officer who might be laboring under an insane delusion.

"Manifestly, therefore, the terms of this statute are subject to certain *practical limitations.* This is the case with most statutes couched in comprehensive terms, and especially with those that modify or otherwise regulate common law offenses. In such instances, the old and the new law are to be considered together; and the former will not be considered to be abolished except so far as the design to produce such effect appears to be clear. In morals, it is an *evil mind* which makes the offense, and this, as a general rule, has been at the root of the criminal law. The consequence is, that it is not to be intended that this principle is discarded merely on account of the *generalities* of statutory language. It is highly reasonable to presume that the law makers did not intend to disgrace or to punish a person who should do an act under the belief that it was lawful to do it. And it is this presumption that fully justifies the statement of Mr. Bishop, 'that a statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurred with his act.' (Crim. Law, 80.)"

See, also, the following cases sustaining our present position:

Commonwealth v. *Kneeland*, 20 Pick., 206.
Commonwealth v. *Bradford*, 9 Metc., 268.
State v. *Sheeley*, 15 Iowa, 405.
Dye v. *Commonwealth*, 7 Grat., 662.
Commonwealth v. *Weld*, Thatcher's Crim. Cas., 157.
State v. *Clark*, 29 N. J. L., 98.
State v. *Preston*, 34 Wis., 682.
U. S. v. *Three Railroad Cars*, 1 Abb., U. S., 196.
Railroad v. *Nash*, 24 N. E. Rep., 884.

Bowers v. *State*, 24 Tex. App., 542.
1 Bishop, Crim. Law, 428.
U. S. v. *Connor*, 3 McLean, 573.

The case of *Felton* v. *the United States* (96 U. S., 699) was a prosecution under Section 16 of the Act of July 20, 1868, imposing taxes on distilled spirits, &c. The action was brought to recover a penalty of $1,000 upon the alleged ground that defendant "knowingly and wilfully" violated certain of the provisions of said section. The Court, in its opinion, stated as follows:

"They must have '*knowingly and wilfully*' omitted to furnish a receiver of sufficient capacity before the severe penalty prescribed could be imposed upon them and their distilled spirits subjected to forfeiture. Doing or omitting to do a thing *knowingly and wilfully* implies, not only a knowledge of the thing, *but a determination, with a bad intent,* to do it or to omit doing it. 'The word "wilfully,"' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," *but with a bad purpose.*' *20 Pick., (Mass.), 220.* '*It is frequently understood,*' *says Bishop,* '*as signifying an evil intent without justifiable excuse.*' Crim. Law, vol. 1, sec. 428."

The case of the *United States* v. *Britton* (108 U. S., 193) was one arising under section 5209 of the Revised Statutes, which forbids the *wilful misapplication* of the moneys of a national banking association by a president, director, cashier, teller, clerk or agent of the association. What this case holds is thus authoritatively explained and illustrated in the case of *Evans* v. *United States* (153 U. S., 502):

"The question there presented was whether the procuring of the discount of such a note" (the parties thereto being insolvent) "by an officer of the association was a *wilful* misapplication of its money within the meaning of the law. It was held that it was not. *The criminality really depends upon the question whether there was, at the time of the discount, a deliberate purpose on the part of the defendant to defraud the bank of the amount.*"

Here, then, is one definition of "wilful" as found in these penal and criminal statutes. There must be an *evil intent*, or, as it is called here, "*a deliberate purpose*" *to do wrong.*

In the case of *Potter* v. *United States* (155 U. S., 438) the defendant was indicted in the Circuit Court of the United States for the District of Massachusetts, for a violation of the provisions of section 5208 of the Revised Statutes, and section 13 of the act of July 12, 1882 (22 Stats., 162).

The court in its opinion proceeds to consider the effect of the word "wilful" contained in said section 13 of the act of 1882, as follows:

"The next question relates to the admissibility of the testimony which was offered and rejected. The charge is of a *wilful violation.* That is the language of the statute. Sec. 5208, Revised Statutes, makes it unlawful for any officer of a national bank to certify a check unless the drawer has on deposit at the time an equal amount of money. But this section carries with it no penalty against the wrongdoing officer. Sec. 13 of the act of 1882 imposes the penalty, and imposes it upon one 'who shall wilfully violate,' etc., as well as upon one 'who shall resort to any device,' etc., 'to evade the provisions of the act,' 'or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association.' The word '*wilful*' is omitted from the description of offenses in the latter part of this section. *Its presence in the first can not be regarded as mere surplusage; it means something. It implies on the part of the officer knowledge and a purpose to do wrong.* Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law. *The significance of the word 'wilful' in criminal statutes has been considered by this court.* In *Felton* v. *United States* (96 U. S., 699, 702), it was said:

"'Doing or omitting to do a thing *knowingly and wilfully*, implies not only a knowledge of the thing, but a determination, *with a bad intent*, to do it or omit doing it. "The word 'wilfully,'" says Chief Justice Shaw, "in the ordinary sense in which it is used in

statutes, means not merely 'voluntarily,' but *with a bad purpose.*" 20 Pick. (Mass.) 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. I, sec. 428."

" And later, in the case of *Evans* v. *United States*, 130 U. S., 584, 594, there was this reference to the words 'wilfully misapplied:'

" 'In fact, *the gravamen of the offense consists in the evil design with which the misapplication is made*, and a count which should omit the words "wilfully," &c., "with intent to defraud," would be clearly bad.'

* * * * * *

" It cannot be that the guilt or innocence of the defendant under this indictment turns upon the mere matter of bookkeeping. While it is true that care must be taken not to weaken the wholesome provisions of the statutes designed to protect depositors and stockholders against the wrongdoings of bank officials, it is of equal importance that they should not be so construed as to make transactions of such officials, carried on with the utmost honesty and in a sincere belief that no wrong was being done, criminal offenses, and subjecting them to the severe punishments which may be imposed under those statutes.

* * * * * *

" *As 'wilful' wrong is of the essence of the accusation, testimony bearing directly on the question of wilfulness is of vital importance, and error in rejecting it cannot be regarded otherwise than as material and manifestly prejudicial.*"

It will be observed that the propositions of law announced in this carefully considered opinion are in the main in direct conflict with, and antagonistic to, the rulings and charge of the court below in the case at bar. In the case at bar the court instructed the jury that it was wholly unnecessary for the Government to show that the intention of the defendant in refusing to answer *was bad or evil.* In this decision of the Supreme Court of the United States, however, it is held that the bad or evil intent is the very "*gravamen*" of the offense.

In the charge to the jury the court below instructed it that it had nothing whatever to do with the "*honesty*" of the defendant in refusing to answer; but, in this opinion, the Supreme Court says that "it is of equal importance that they [penal statutes] should not be so construed as to make transactions of such officials, carried on with the utmost *honesty*, and in a sincere belief that no wrong was being done, criminal offenses." The court below denied all significance and effect, upon the meaning of the statute, of the word "willful" as therein employed, while the Supreme Court, on the other hand, in this opinion, declares in express terms that the presence of this word "willfully" in the 13th section of the act of 1882 "can not be regarded as surplusage; it means something." (Page 446.)

In his charge to the jury the court below instructed it that it had absolutely nothing to do with the question whether the defendant in refusing to answer acted in *good faith*.

III.

Tenor.

Each and every question set out in the indictment is declared to have been "*of the tenor following, that is to say.*" Now, what kind of exactitude is required of the proofs as to the "description" of an instrument which the pleader undertakes to set out *according to its tenor*, is thus defined in Bouvier's definition of the word "tenor":

"*Tenor.* In pleading. A term used to denote that *an exact copy* is set out. 2 Phillips Ev., 99; 2 Russell on Crimes, 365; 1 Chitty Crim. Law, 255; 1 Mass., 203; 1 East., 180, and cases cited in notes."

And the same thing as that just quoted from Bouvier, to wit, that the word "tenor" is *a technical word of the law* and always imports an *exact copy*, is held in the following from the opinion of the court in the case of *Commonwealth* v. *Wright* (1 Cushing, 65, 66):

After the jury had retired to deliberate upon its verdict, and had been out several hours, it returned to the court room and submitted to the court the question whether the admission by the defendant that the questions as set forth in the indictment were "substantially" the same was equivalent to an admission by him that they were the same, and whether it could act upon that hypothesis.

To this question the court responded as follows:

"I answer that in the affirmative. If you find from the evidence that the defendant himself upon the stand admitted that the questions put to him, and which he declined to answer, before the Committee, were *substantially* the same as those set forth in the indictment, *that is sufficient to prove that they are the same.*"

"The word 'tenor' imports an EXACT COPY—that is, to set forth *in the words and figures*—whereas the word 'purport' means only the substance or general import of the instrument."

In the opinion of the court in the case of the *State* v. *Atkins* (9 Blackford, 458), it is said:

"The most technical mode of doing this" (setting out an exact copy), "is to preface the recital of the instrument by the words '*of the tenor following,*' but equivalent terms, such as 'in the words,' or 'as follows,' or 'in the words and figures following,' will do. (1 Chitty. Crim. Law, 234; 3 *id.*, 1040; 1 East, 180.) 'Purport,' however, has a significance different from 'tenor.' It means the substance as it appears on the face of the instrument; 'tenor' imports an exact copy. (1 Chitty Crim. Law, 235; 1 East, 983)."

In the opinion by Marcy, J., in the case of the *People* v. *Warner* (5 Wend., 273), the court having been brought to the question as to what was the exact technical meaning of the terms "in substance and effect,"

as distinguished from the words " of the *tenor* following," it is said :

" Whether it was intended in this case to set forth the *oath* (alleged to have been falsely taken) verbatim depends upon the true definition of the word ' effect.' The word ' *tenor* ' has a technical meaning and requires an *exact copy ;* and the defendant's counsel infers that because ' *effect* ' is often used with it, a like meaning is to be put on that word. This inference does not strike me as conclusive or correct. Because ' *tenor* ' and ' effect ' require an exact copy, it is not to be inferred that ' substance ' and ' effect ' require as much."

See, also, the same rule stated in the following cases :

Commonwealth v. *Stevens*, 1 Mass., 203.
State v. *Townsend*, 86 N. C., 679.
State v. *Jackson*, 26 Iowa, 407.
Griffin v. *State*, 14 Ohio St., 61.
State v. *Jay*, 34 N. J. L., 368.
People v. *Kingsley*, 2 Cow., 522.
Dyer v. *State*, 24 Tex., 132.
2 Greenleaf on Ev., Sec. 11, Note 1.
U. S. v. *Le Barron*, 4 Wall., 462.

Should the reply to the foregoing authorities be attempted that they have relation only to the exact proof required of existing and written instruments, and, therefore, do not apply to oral questions put by a committee to a witness, and that, as these questions, when put, are not necessarily written instruments, the said authorities have no application to the case at bar, then the answer to such position is plain and obvious.

The practice of the Senate requires that the testimony of witnesses taken in an investigation shall be reduced to writing. They are, therefore, in contemplation of law, written instruments or documents.

But what is more and absolutely conclusive is that this statute, in legal effect, requires that the questions asked and the answer or refusal shall be reduced to writing, shall be reported to the Senate in writing, shall be by the Senate placed under its seal, and shall be forwarded to the prosecutor in writing for the pur-

poses of indictment. They are, consequently, when they come into the hands of the prosecutor, written documents, and not only written, but certified and sealed, and, as such, made the predicate of the indictment.

Therefore, when this indictment is framed and found, if not when the question is put, the law requires each question to be in writing. It must not only be a written instrument, but must exist under the certificate and seal of the Senate, and, as such, must become and be the only basis on which the indictment can be framed and found.

In giving to the jury the instruction asked on behalf of the prosecution, the court defined the duty of the jury in said case as follows :

" First, whether the defendant was summoned; second, whether he appeared; third, whether he was sworn; and, fourth, whether any one of the questions mentioned in the indictment was put to him; and lastly, whether he declined to answer any one of them. In other words, it is not necessary to prove that each one of these questions mentioned in the indictment was put to him, and that he declined to answer each one of them. It is sufficient for you to find that any one of the questions in the indictment was put to him and he declined to answer any one of the questions. That would make out the indictment without considering the others at all.

" You, of course, are the judges of whether the evidence proves beyond a reasonable doubt those facts which I have mentioned; but you should give the evidence a fair consideration and application like you do in all other cases, and if it satisfies your mind beyond a reasonable doubt that those things occurred, then you should bring in a verdict of guilty. Of course, if you have a reasonable doubt, you solve that in favor of the defendant and acquit."

In this passage just quoted, there is a most exact, careful, unambiguous and studied statement of all the facts that the jury need pass upon or consider in reaching its verdict; and it will be observed that this exact

enumeration of the facts which the jury might consider excludes from its consideration, many things averred in the indictment.

The effect of this striking out of averments as surplusage was plainly and unmistakably to excuse the jury from finding :

(1) That any tariff legislation, affecting the tariff on and the price of sugar, was pending in Congress at the times named in the indictment.

(2) That the pendency of such legislation affected the value of the stocks named in the questions put to the defendant and which he declined to answer.

(3) It excused the jury from considering the matter as to whether the apparent chances of proposed legislation as to tariff on sugar had the effect of putting the value of sugar, and also the value of the stocks named in said question, up or down accordingly as the probabilities of said legislation being enacted or defeated were disclosed to the public by the action of the Houses of Congress.

(4) It took away from the jury the consideration and right to pass upon every fact tending to give, or bearing upon, the matter of the jurisdiction of the Senate and of its committee to propound and enforce answers to the questions set out in the indictment.

In the case of the *United States* v. *Brown* (3 McLean, 233), this principle is stated as follows :

"*The rules of pleading are the same in civil and in criminal cases.* Where the prosecutor states the offense with greater particularity than he is bound to do, the proof must correspond to the averments. That can not be regarded as surplusage which is *connected with the offense.*"

The case of *Commonwealth* v. *Wellington* (7 Allen, 302), is to the same effect. In the opinion of the court the rule is stated thus :

"And the rule seems to be fully established, both in civil and criminal cases, with respect to what statements in the declaration or indictment are necessary to be proved, that if the whole of the statement can be stricken out without destroying the accusation and charge in the one case, and the plaintiff's right of action in the other, it is not necessary to prove the particular allegation; but if the whole can not be stricken out without getting rid of a part essential to the accusation or cause of action, then, *though the averment be more particular than it need have been, the whole must be proved or the action or indictment can not be maintained.*" (1 Chit. Pl., 6th Amer. Ed., 307; 3 Stark. Ev., 4th Amer. Ed., 1574; *Stoddart* v. *Palmer*, 3 B. & C., 2; *Bristow* v. *Wright*, 2 Doug., 667.)

In the case of *Potter* v. *United States* (155 U. S., 445), already cited, the Supreme Court of the United States, states as follows:

"It is generally true, as claimed, that, *where an indictment is unnecessarily descriptive, even the unnecessary description must be proved as laid.*"

See, also, the same thing stated in the following cases:

Commonwealth v. *Stone*, 152 Mass., 498.
Commonwealth v. *Luscomb*, 130 Mass., 42.
1 Greenleaf on Ev., Sec. 51.
U. S. v. *Keen*, 1 McLean, 429; 10 Am. and Eng. Ency. Law, p. 558, Note 3, and cases there cited.

That which the court withdrew from the jury was not only not surplusage in the sense that it was unnecessary averment which could not be stricken out because it connected itself with the body of the offense charged, *but it was not surplusage in any sense.* As we have said, it was not only not surplusage, but it was absolutely *jurisdictional*, and it presented to the jury the only features of the case which made it competent for the Senate to investigate the conduct of Senators in regard to the matter mentioned in the questions set out in the indictment.

By what we have said as to the matter stricken from the indictment being material and not being surplusage, it is not meant to say that all the matter stricken out was material. What we do mean is, that some of it was not merely material but jurisdictional, and, therefore, that its erasure from the indictment and from the notice of the jury was gross, palpable and vital error. Of this material class not surplusage and which was so stricken out, are all the averments of the indictment in regard to the tariff legislation then pending and the effect of fluctuations in such legislation upon the value of sugar stocks asked about in the questions named in the indictment.

And much more that was withdrawn from the attention of the jury by striking out and by the other rulings of the court, that was material, as, for example, all evidence bearing upon the alleged wilfulness of the defendant's refusal to answer.

But we need not go through in detail or attempt to enumerate these material matters so stricken out, because those named are as effectual in the way of reversing the judgment below as a multitude of such would be.

The Act of Congress under which the indictment herein was found and conviction had is unconstitutional and void.

As applied to the present case, Sec. 102 of the Revised Statutes of the United States provides that if any person summoned as a witness, having appeared, "refuses to answer any question pertinent to the question under inquiry," he "shall be deemed guilty of a misdemeanor," &c.

Sec. 103 provides that he shall not be privileged to refuse to testify on the ground that his testimony or the production of the paper may tend to disgrace him or render him infamous.

These two sections are parts of one scheme and they are inseparable.

The provisions of this act are, in substance and effect, precisely as though it had been enacted as follows: If any person, summoned before a committee of the Senate, shall refuse to testify, even though his testimony may tend to criminate him, he shall be deemed guilty of a misdemeanor and shall be punished, &c.

It cannot be doubted that such an act would be void, and we submit that the facts that the division into two sections does not relieve any part of it from this objection. The intent of Congress is clearly expressed, and no part of the act can be judicially eliminated so as to relieve some other part of the vice that permeates the whole (Baldwin v. Franks, 120 U. S., 679; Prosser v. Illinois, 116 U. S., 252; Virginia Coupon Cases, 114 U. S., 269; U. S. v. Reese, 92 U. S., 214).

If Section 103 be eliminated, Section 102 standing alone is void, because it is a broad provision that if any person shall "refuse" to testify, without any limitation whatever, he shall be guilty of a misdemeanor, &c.

The intention of Congress must be as broad as its language. The courts cannot limit the scope of the language, nor can the courts apply the language to cases where Congress would have the power to make the act an offense, and exclude others where it did not have the power.

This provision that if any person shall refuse is broad enough to embrace a refusal because the answer would criminate, and the courts cannot say that such void part must be by the courts excluded, and that it may be operative as to others, nor can the courts say that Congress did not intend to embrace such acts that it was not in the power of Congress to embrace.

In the Trade-Mark cases (100 U. S., 82) the court says:

"It is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

But the intention of Congress to embrace cases not within its power is made manifest by Sec. 103, and it is not in the power of the courts to revise that intent. Therefore, the act is wholly inoperative and void.

We have, in the foregoing and above assignment of errors herein, pointed out the particulars in which it is claimed that the indictment and conviction of petitioner are in violation of the Constitution and Laws of the United States. In the brief filed in support of the application made by this petitioner to this Court for a writ of *habeas corpus*, to test the constitutionality of said Act of Congress, and the validity of his conviction upon an indictment found thereunder, and which said application for *habeas corpus* is now pending before this Court undetermined, we have, at considerable length, attempted to enforce and support the several propositions relied upon by us with respect to said constitutionality or otherwise of said Act of Congress, and, for that reason, we will not here repeat the same, but respectfully ask that this Court may refer to and read the said brief in said *habeas corpus* case in connection with this part of the present brief.

From what has been above stated, at perhaps unnecessary length, it must be most manifest that the questions involved herein are of sufficient gravity and importance to warrant their review by the highest court in the land.

Respectfully submitted,

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J. W. WILSON,
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Of Counsel for the Petitioner.

Supreme Court, U. S.
FILED.
MAR 20 1897
JAMES H. McKENNEY,
CLERK.

166-721

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 749

IN THE MATTER OF

ELVERTON R. CHAPMAN.

POINTS SUBMITTED BY MR EDMUNDS OF COUNSEL FOR CHAPMAN.

Walker, Evans & Cogswell Co., Printers, Charleston, S. C.

Supreme Court of the United States.

OCTOBER TERM, 1896.

CHAPMAN'S CASE.

No.

STATEMENT AND POINTS SUBMITTED BY MR. GEORGE F. EDMUNDS OF COUNSEL FOR CHAPMAN.

STATEMENT.

The so-called Wilson tariff bill being pending, the Senate on the 17th day of May, 1894, adopted a resolution in the words following: "WHEREAS, it has been stated in the *Sun*, a newspaper published in New York, that bribes

have been offered to certain Senators to induce them to vote against the pending tariff bill; and

Whereas, it has also been stated in a signed article in the *Press*, a newspaper published in Philadelphia, that the sugar schedule has been made up as it now stands in the proposed amendment in consideration of large sums of money paid for campaign purposes of the Democratic party.

Therefore, Resolved, that a committee of five Senators be appointed to investigate these charges and to inquire further whether any contributions have been made by the Sugar Trust or any person connected therewith to any political party for campaign or election purposes, or to secure or defeat legislation, and whether any Senator has been or is speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate, and with power to send for persons and papers and to administer oaths.

Resolved, further, that said committee be authorized to investigate and report upon any charge or charges which may be filed before it alleging that the action of any Senator has been corruptly or improperly influenced in the consideration of said bill or that any attempt has been made to so influence legislation." (Record, p.)

The committee was appointed on the same day. (Rec., Ib.)

Chapman, a New York stockbroker of high standing, was summoned and appeared before the committee as a witness, and stated, in answer to questions, that his firm

were dealers in sugar stocks. He was then asked whether any of the transactions of his firm were those "in which Senators of the United States were interested either directly or indirectly during the pendency of the present tariff bill."

This question and several others of the same purport Chapman declined to answer on the ground that the answer required a disclosure of his and his customers private affairs, etc., (Rec. p.)

The committee allowed Chapman to consult Counsel as to his obligation to answer such questions, (Rec. p.) But the Supreme Court of the District of Columbia at the trial refused to allow him, except as a matter of grace, to prove that he did consult counsel, that he was advised that he was not bound to answer, that he honestly believed the advice to be sound and acted upon it in absolute sincerity and good faith. Having done this act of personal grace the Trial Court directed the jury that they had nothing to do with that question and must not take it into consideration. (Rec. p.)

The indictment avers simply and solely that the witness stated in response to these questions, "I decline to answer." (Rec. p.)

The indictment does not aver that the refusal was wrongful, but it does aver that it was "wilful."

It does not aver that the Senate resolution was adopted with a view to the punishment or expulsion of any Senator.

It does not aver that the Senate resolution was adopted with a view to any legislation.

It does not aver that the committee ever made any report on the subject.

It does not aver that the Senate ever took any action whatever in the matter after this declination of the witness to answer the question.

It does not aver that the President of the Senate ever certified the matter to the District Attorney of the District of Columbia.

It does not aver that the Seal of the Senate was used, and it does not aver that the Senate authorized its use by its President.

The whole gravamen of the indictment consists in the bald statement of the adoption of the resolution above quoted, the appointment of the Committee, the summoning and attendance of Chapman, the putting of the question and the wilful refusal to answer it.

At the trial the prosecution did not attempt to prove anything beyond the historical fact of the tariff proceedings, the existence of the Sugar Company, the newspaper publications, the resolution of the Senate, the appointment of the Committee, the asking the questions and the declination to answer. It attempted no proof that the Committee insisted on an answer. It attempted no proof that the Committee ever reported to the Senate. It attempted no proof that the Senate ever acted upon the subject. It attempted no proof that the President of the Senate ever certified the matter to the District Attorney of the District of Columbia.

The Court refused to allow *all* that took place between the Committee and Chapman on the subject, to be proved and

admitted, but only such parts of the transaction as it suited the District Attorney to offer. (Rec. p. .)

It is true that Senator Gray, a witness for the prosecution, stated on cross examination, "that he made the report of the Committee on the alleged recusancy of Mr. Chapman," but the Court refused to allow him to be asked whether the Senate took any action, on the express and sole ground that such evidence was immaterial. The same ruling was made in respect to the use of the seal of the Senate. (Rec. p. .)

The Court refused to allow Chapman to prove that by the rules of the Senate adopted after the passage of the Act of 1857 and after the revision of the Statutes in 1873, the seal of the Senate could not be lawfully used without its direction.

On this state of the evidence the Court granted the prayer of the District Attorney for an instruction to the jury as follows:

"If the jury find from the evidence that the defendant, Elverton R. Chapman, was summoned as a witness to testify before a Committee of the Senate, appointed under a resolution of the Senate of May 17th, 1894, recited in the indictment and given in evidence, and that he appeared before said Committee in the District of Columbia and was there sworn as a witness, and that during his examination as such witness there were propounded to him any of the questions recited in the indictment as having been propounded to him, and that he refused to answer said questions or any of them, responding thereto in the manner set out in the indictment, then the jury are instructed that they should find the defendant guilty as indicted."

To this instruction Chapman objected and excepted.

The words in the indictment alleging that Chapman's refusal to answer was *wilful,* were thus entirely eliminated from the case. Chapman, among others things requested the Court to charge the jury that they must find that Chapman *wilfully* refused to answer. (Rec. p. .) This the Court refused to do, to which exception was duly taken. (Rec. p. .)

The jury under these instructions returned a verdict of guilty. The case was then taken to the Court of Appeals of the District of Columbia, and the judgment below was there affirmed.

POINTS.

I. The Act of 1857, (Statute XI, p. 155,) provided for the punishment of the recusant witness in addition to other pains and penalties that might be inflicted. The Revised Statutes omitted this latter clause.

It is insisted that Sections 102 and 103 are in violation of the Constitution.

a. Both sections must be taken together, and inasmuch as Section 103 is confessedly unconstitutional, Section 102 must fall with it.

b. Section 102, standing by itself, is unconstitutional, be-

cause it takes away from the Houses of Congress one of their inherent constitutional powers to regulate their own proceedings, and to punish any contemptuous interference with the exertion of their constitutional powers.

As was stated by the Supreme Court of Massachusetts in Emery's case, (107 Mass., 172): "The right of either branch to inquire into the alleged disrespect or contempt of its authority, and to compel the attendance of the party charged therewith to answer the charge and await its judgment thereon is exclusive and will not be interfered with."

The powers of Congress under the Constitution are in entire contrast with the powers of State Legislatures. Congress possesses no powers that are not delegated to it by the Constitution, while the powers of the State Legislatures are sovereign except so far as they may be limited by their Constitutions.

As was stated by the Court of Appeals of the State of New York, in People vs. Keeler, (99 New York, p. 479,) referring to the power of the Houses of Congress to punish for contempt, that "If, as contended, no such power can be exercised by Congress under the limited authority delegated to it by the Constitution, the power could not be created and conferred by any Act of Congress," This is upon the plain principle that the law could not confer upon either House of Congress powers that the Constitution did not impute to them; and plainly, *e converso*, an Act of Congress cannot take away from or impair any authority that the Constitution has conferred upon either House. The Court of Appeals then states the distinction above named between the powers of the Legislatures of the States and those of Congress as follows: "The inquiry is not whether

the power to enact such a law is to be found in the State Constitution, but whether such legislation is prohibited or restrained by that instrument, or by the Constitution of the United States. Except as thus limited, the State Legislature possesses the whole legislative power of the State."

The Legislature of New York, having thus the supreme power, had passed an Act providing for and regulating the punishment of contempt by the Houses of its Legislature, and it was under the proceeding of one of the Houses that the Keeler case arose. The Court of Appeals disposed of one objection in the Keeler case, that no person could be punished twice for the same offence, by referring to the provision of the law which expressly provided that no person should be punished under more than one of the provisions, having in view, what has already been stated, the fact that the Legislature of New York had supreme power over the subject, and might provide for a criminal punishment in Court in the place of a punishment by either House of the Legislature.

The Kilbourne case recognizes the existence of the constitutional power of the houses of Congress to punish for contempt in cases in which the houses have authority to investigate, and in which, having such authority, it is exercised consistently with the private rights of citizens. The conclusion then, it is submitted, is irresistible:

First. That these powers of each house of Congress cannot be either diminished or enlarged by any legislative act; and

Second. That Congress cannot by law provide for any trial and punishment either as an independent one or as one which if inflicted should deprive either house from proceeding in the exercise of its inherent constitutional right to punish; and

Third. That a proceeding under the Statute in question, if valid, could not be defeated or barred by anything that either house might do in respect of the matter.

II. The Statute is, on its face, absolute; it describes the subject as "*Any* matter under inquiry before either house or any committee of either house." The inquiry may be, so far as the Act states it, like the one in the Kilbourne case, entirely beyond the legitimate authority of the house; and if any limitation is to exist it must be imported by inference into this criminal Statute. The refusal to answer a question pertinent to the inquiry is made a crime without any reference to what either the committee or either house might think about it, or might choose to do about it. The offence, under the words of the Act, is complete the moment the witness declines to answer even before a committee, as in this case; and the Court below held that this was so, and that no further action or non-action of the committee or of the Senate was necessary or to be considered.

This compels an inquiry into what is the nature and power of the committee of the Senate. It is submitted that it is plain that the committee is merely the agent of the body appointing it, and that it has no powers of its own in respect of deciding whether the inquiry ordered by the body is a lawful one, or whether the question it puts to the witness is a pertinent or otherwise lawful one, or whether in any case the question should be pressed.

This being so, it is obvious that both upon principles of constitutional and statutory law no offence can in such a

case be committed until the body whose agent the committee is shall have determined that the witness ought to answer. If this be so, a Statute which undertakes to punish the witness before an offence shall have become complete is both unconstitutional and tyrannical. It is undertaking to make a perfectly innocent act punishable as crime.

This Statute, then, taken as it reads and as the Court below held it to mean is invalid.

But if we are to construe into it the implication that the words "any matter under inquiry" must be matter with which the Senate had power to deal, and deal with in the way in which it was proceeding, and to mean that the refusal of the witness to answer should not become complete and criminal until that refusal had been made to the body itself, then it is confessedly plain that no offence was committed by Mr. Chapman.

If the Courts can rebuild a criminal Statute by implications, the fair implication is that in order to render Chapman guilty of contempt of the Senate the inquiry must have been proper, the question pertinent, and Mr. Chapman required by the Senate itself to answer, and failing that, that the Senate should have directed the matter to be sent to the judicial authorities. If Congress had the power to make any law upon the subject, such a law might be a reasonable and fair one. It may be added, what is universal history without a single exception, it is believed, that no witness or any other person offending against any Legislative body has ever been punished by it or otherwise without having been brought before the body and given an opportunity to be heard, and the body then passing upon the question.

III. It is insisted that the Statute in question is in direct violation of that clause of the Fifth Article of the amendments to the Constitution, which provides, "Nor shall any person be *subject* for the same offence to be *twice put in jeopardy* of life or of limb."

As has been already shown, the Senate undoubtedly possessed the power, if its inquiry was legitimate and the question pertinent and lawful, to punish the witness for his offence.

The language of the Constitution is peculiar, and, it is thought, incapable of more than one construction. It does not say that the offender shall not be twice *punished* for the same offence. It does not say, merely, that he shall not be twice put in *jeopardy*, but it does say that he shall not be *subject to be* twice put in jeopardy. To be twice punished is an entirely different thing from being twice put in jeopardy. Being twice put in jeopardy is an entirely different thing from the requirement of the Constitution, that he shall not be *subject* to be twice put in jeopardy. It is impossible, therefore, without obliterating some of the words in the clause quoted, to hold that there may constitutionally coexist two laws, each of which provides for punishing the *same* offence by two distinct and independent tribunals. The law which gives the Senate the power to punish is the *Constitution*; the law which undertakes to give the Courts the power to punish is the statute. The statute, therefore, must give way to the Constitution.

The District Court of Appeals endeavored to overcome this difficulty by holding that Chapman had not been "in fact twice put in jeopardy," and could not *at the time its opinion was delivered* "by any possibility be twice put in jeop-

ardy for this offence." This statement entirely fails to meet the language of the Constitution requiring that a party shall not be exposed to be twice put in jeopardy. The word "subject" in the Constitution cannot be gotten rid of by ignoring its existence. Nor is the Constitution met by the suggestion of the Court of Appeals, that inasmuch as after the supposed offence was committed and before the trial of the accused Congress had adjourned, so that when Chapman was brought to trial there was no other authority that could punish him. It is believed, with great respect to that learned Court, that no such construction was ever before put upon similar words. The answer would have been a perfectly good one if the Constitution had only provided either that a party should not be twice *punished*, or that he should not be twice tried; but, as has been stated, the Constitution says more. It is obvious that if the Court in the district could not have tried and punished Chapman during the session of the Senate, and while the Senate had exclusive power to punish, it certainly could not do so from the fact that the Senate had ceased to exist any more than it could if the Senate had disposed of the case, either by deciding that the witness had not been guilty of contempt, or by deciding that he had. It was not a case of concurrent jurisdiction; but if it had been, the Senate had the case already *sub judice*, and, therefore, the other jurisdiction could not attach.

IV. The making of a report by the committee, it is insisted, is, under the Statute, a jurisdictional requirement which the indictment should have alleged. And the same is true in respect of the sending of the matter to the Dis-

trict Attorney. The Court could not take jurisdiction without it. The grand jury could not indict without the fact of the report, or without the certificate of the President of the Senate. Suppose it to have been proved that no report and no certificate had existed, and that the matter still remained in the hands of the committee, no step having been taken after the refusal of Chapman to answer the questions propounded? Can it be claimed that in such a case a Court was invested with jurisdiction, or can it be claimed that any offence had yet been committed? The committee in such a case might have been considering whether it ought to insist upon an answer, and the case shows that no answer ever was insisted upon.

The matter is thus reduced in these aspects to the proposition which must be maintained by the prosecution; that the mere refusal to answer without any insistence by the committee, or report to or action by the Senate or by its President, created an absolute offence and gave *eo instanti* an indefeasible jurisdiction to the District Court to punish the assumed offence. This is contrary to all principle and all practice in cases of contempt. The offence, if one was committed, was a criminal offence against the sovereignty of the United States represented in the Senate, where, according to all practice, the respondent before being condemned had the right to be heard and to justify or excuse himself upon any ground that the Senate should deem sufficient. The Senate could determine the intended extent and purpose of its investigation, and of which it confessedly alone had any jurisdiction if it were proceeding within its constitutional powers; but the Court below held that the Senate had nothing to do with the subject after the witness declined to answer, and that it must take the Statute literally and must infer

(for the resolution does not state it) the purpose of the investigation and the steps either of punishment or legislation which the Senate might take, while the Senate might have, in acting on the report of the committee, determined that it had no purpose of expelling or otherwise punishing the Senator, or of making the tariff or any other law different to what it would have made it had no contribution been made to the party, and had no Senator traded in the commodity that was thereby affected. No one will dispute that the Senate, and the Senate exclusively, possessed that power, and yet without its being exercised, and without any opportunity either for Chapman to vindicate or excuse himself before the Senate, or any opportunity of the Senate to declare its purpose, the Statute, as construed by the Court below, makes Chapman instantly guilty, and makes the purpose of the Senate what the Court may happen to guess it must or may have been.

But it is perfectly obvious from the preamble and statement of the first resolution that neither of these purposes existed on the part of the Senate. Its obvious object was to discredit the character of the Democratic party as a tariff making one, by leading the public to believe, that because the sugar people had contributed large sums of money for campaign purposes, that, therefore, an amendment submitted by a Senator, whose conduct had in no way been drawn in question, had been so submitted on account of gratitude to the contributors to the political campaign. It was this sort of thing to be exploited through the newspapers that the resolution was looking to; and this is made still more clear by a distinct and designed omission in the first resolution of any requirement that the committee should ever report, while the second resolution, touching charges of corruption against

Senators, in terms required that the committee should report upon that particular subject. The circumstance, that, by parliamentary law, committees may have authority to report without the direction of the Senate if they think proper, does not help it, for then a report would be in the discretion of the committee, and so no action by the Senate in respect to that resolution could have been contemplated by it when it only gave the committee authority to make the inquiries and stop there, while in the other resolution it did require that the Senate should be informed of the proceedings of the committee.

The case then falls distinctly, in this respect, within the decision of this Court in the Kilbourne case.

V. It must be kept in view that there is no pretence that Chapman was asked any question under the second resolution or that he declined to answer if he were asked any at all; which he was not. The Senate had no authority to invade the private affairs either of its own members or of other citizens, for the purpose either of curiosity and increase of knowledge, or for the purpose of discrediting or promoting the interests of any political party or anybody else.

The transactions referred to in the first resolution, indeed, had no reference, in so far as the different questions to Chapman were concerned, even to political contributions. It follows, therefore, conclusively, that the statement in the preamble had nothing whatever to do with the questions put to the witness. These questions were put almost in the very language of the second clause of the first resolution, viz: "Whether any Senator has been or is speculating in what

are known as sugar stocks during the consideration of the tariff bill now before the Senate."

That is all. There is no intimation or inference that any Senator had been doing anything either legally or morally wrong, unless speculating, which is buying or selling with the hope of profit, in something the value of which may be affected by general legislation is illegal or morally wrong. There is no pretence that such dealing was illegal. It was a legal right that every citizen, whether a Senator or not, possessed. It was not a violation of any trust or duty that a Senator owed to the body, whatever we may think of its good taste.

In all general legislation like a tariff bill, either by Congress, or State Legislatures or Parliaments, almost every member of the legislative body must be in some way affected favorably or unfavorably in his business operations. All administrative laws are made for the very purpose of affecting the material business interests of the people. If, therefore, members of legislative bodies are guilty of violation of their duty in doing business which is affected by such general administrative legislation, it would be impossible to pass any law at all. And in view of this obvious circumstance the rules of both houses of Congress and, probably, of all other legislative bodies, provide, in respect of the conduct of their members, that no member shall vote upon any question in which he is directly and personally interested; thus drawing the distinction just stated. The Senate, therefore, could have no *right* either to deal with the Senator for disorderly behavior, or to expel him for doing such things. The *power* to deal with the member for disorderly behavior could be reviewed by the judiciary, for, as is settled, the judiciary at last has the right to decide whether the behavior

of the accused member was disorderly in a constitutional sense. The *power* but not the right to expel is, of course, not reviewable by the judiciary, but this fact furnishes no ground for compelling the witness to expose his private affairs for such a purpose, unless the act for which the expulsion was contemplated was one that would *reasonably* justify the Senate in exercising the power. For here comes in the universal safeguard of the fourth and fifth amendments of the Constitution. The citizen has "the *right to be secure*" in respect to his papers and his private affairs "against *unreasonable* searches and seizures."

The Senate, therefore, in prosecuting an inquiry intended to result in the expulsion or punishment of a Senator for an unjustifiable cause, has no right to require the witness to answer its questions about his private affairs; and the Senate itself is not the exclusive judge of what is reasonable or unreasonable—that, in the end, is for the judiciary.

It follows, therefore, that granting the *power* of expulsion, the witness, in a case like this, cannot be compelled to disclose his private and innocent transactions. The Kilbourne case is precisely in point upon this branch of the subject. Suppose the witness had answered that Senator A. had been and was buying or selling sugar stocks, and the committee had accordingly reported a resolution that Senator A. should be committed to prison for ten days for "disorderly behavior?" Can it be doubted that the Judiciary would have discharged him on *habeas corpus?* If Congress has *any* power to interfere it has *all.* Could a statute define and punish "disorderly behaviour," or regulate expulsion?

VI. It was contended in the Court below that the Statute did not violate the fifth amendment of the Constitution, because the offence named in the Statute was not the *same* offence which the Senate had the right to punish as a contempt, but the Court of Appeals did not adopt that contention. It is proper, however, as the contention may be repeated here, to refer to it.

The only thing Chapman did was to refuse to say anything. How this can be split into two distinct offences it is not easy to see if, as the Court below suggested, the offence was one against the administration of justice. But the Court below thought that the refusal to obey the lawful order of either House of Congress was not an offence in the sense of criminal law, unless especially made so by Statute. If by "criminal law" is meant statute law, the statement is self-evident. If the Court meant that it was an offense against the sovereignty of the Government, and in that sense a criminal offence, then it is respectfully submitted, the Court was in error in supposing it not an offence in "criminal law." Fine or imprisonment for contempt is a *punishment;* and nothing can be punished but crime. Crime can only be committed against a sovereign power. And the supposed crime in this case was, therefore, committed against the sovereignty of the United States, and was punishable as such by the Senate, and not punishable as a crime against *itself*, which, in the very nature of government could not exist.

This case is entirely different from all those that were cited by the prosecution in the Court below. In those cases there were two offences distinct in their character and entirely different in their results—such as the striking a person in Court or in the Senate, when the act would have been a crime had it been committed elsewhere, and entirely

distinct from the other and different crime committed against the same sovereignty by bringing the exertion of its authority into contempt.

VI. There is no allegation in the indictment that the refusal to answer was either *unlawful* or *wrongful*, and it is submitted, with confidence, that it is an essential element of the offence stated in the statute that the wilfulness imputed to the witness must be either unlawful or wrongful; for it is obvious that the act of wilfully refusing, in the sense of the same occurring by the mere act of the refusal of the witness, would not make the witness guilty if he misunderstood the purport and tenor of the question, or if his wilful refusal arose from a state of unsound mind.

The quality, therefore, of wrongfulness must be alleged as an essential ingredient of the wilfulness that is criminal.

It is true that the clause of the Statute in question does not contain either the word wilful or wrongful, though the preceding clause uses the word wilfully. The word can, however, be fairly carried to the clause in question, and it was doubtless so intended, although the whole Act was passed in a tempest of emotion, growing out of the Simonton case.

The indictment contained the word wilfully as a description and definition of the alleged offense. Being so described and defined, it must have been proved whether it was necessary to allege it or not.

But the trial Court charged the word out of the case, and refused to allow the jury to consider whether Chapman

acted wilfully or not. This was clearly error. And it was error not alone under the Statute but under the Constitution, because in the very nature of things no act of this sort could be wrong or could be treated by the Senate as an offence, or could be made so by a legislative declaration unless the act to be punished was wilful or wrongful.

It is not only admitted, but affirmed, that neither a witness nor any other person can take the law into his own hands and turn himself into a judge of it contumaciously, and thus set himself up against the lawful exertion of a lawful authority.

But it is equally true that where a party, in a case of new impression, or of any kind of doubt, with a sincere desire to obey the real law, acts under the advice of counsel upon an honest and true statement of his case, and acts in perfect good faith, and under the belief that he is doing his full duty in obedience to the real law, he cannot be guilty of a crime in so acting.

"Wilfulness," in criminal statutes, includes a contumacious and defiant course of conduct.

It may be suggested on the other side that in case of such acts as this and others of the class above mentioned, the laws as they turned out really to be, could not be enforced if every party who should stand upon such ground was thus to be excused from punishment. But the answer is that when the doubts of validity and construction shall have been settled against the position of the party, then a refusal by him to answer would rightfully be considered by a Court or jury to have been contumacious and defiant.

Thus there is no danger that in adhering to the principles I have stated there can be a defeat of the operation of the laws. If in this case when the witness was before the com-

mittee, the case of *Kilbourn vs. Thompson.* (103 U. S.,) had been decided the other way, and the Supreme Court of the United States had determined that either House of Congress had the power to inquire into the private and lawful transactions of citizens, whether Senators or not, and that any witness was bound, on any such inquiry, to open his private books and papers for the inspection of the Committee, or if counsel had advised the witness that he was bound to answer, and he had then refused, on his own motion, it would have been competent and right for the jury to find that he did wrongfully, and with evil and defiant intent, refuse to do what was lawfully required of him.

But that is the very reverse of this case.

The very exhaustive brief of my learned associate, and its reference to the authorities, makes it unnecessary that I should refer to any of them further than I have already done.

GEO. F. EDMUNDS.

Supreme Court, U. S.
APR 8 1897
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Supreme Court of the United States.

OCTOBER TERM, 1896.

EX PARTE ELVERTON R. CHAPMAN, PETITIONER.

Brief for Petitioner in Reply to Brief of United States.

GEORGE F. EDMUNDS,
JEREMIAH M. WILSON,
Of Counsel.

For Brf. of U. S. see 11 Orig.e this term — Ex parte Chapman

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

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Brief for Petitioner in Reply to Brief of United States.

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1. The case of Palmer, 3 Wheaton, 610, is the simple one of the Court holding, in a statute expressing the sovereign will, that the description of the offenses referred only to those within the national jurisdiction; and, second, the *declared* intention of the act of 1857 was to make the word "any" apply literally and explicitly to *every* refusal, whether justifiable or not.

2. Kirby's case, 7 Wall., 486, is a distinct authority on our side in respect of the meaning of the word "willfully," and we agree to its general statement as to the principles upon which laws should be construed.

3. The claim that the act of 1857 does not interfere with the constitutional power of either House to punish presents one of the crucial points of the case. The title of the act is correctly referred to in Mr. Conrad's brief as one *more*

effectually to enforce the attendance and giving of testimony by witnesses. We agree that the title perfectly expressed the purpose and pointed out the true construction of the act. We agree that it was not designed to supersede the constitutional powers of the Houses, but that it was designed, as it expressly stated, to provide an *additional penalty* in such cases; and the repeal of the words providing an additional penalty in 1862 either left the act in legal effect exactly what it was before or else it turned it into an act which was designed to and had the effect of transferring the power of punishment by either House to the judicial courts. In either case we insist that the act is invalid, no matter which horn of the dilemma may be taken.

This brings us to the first fundamental question which is argued in the brief of the other side on pages 6 and 7.

We entirely agree that many acts may involve the commission of two or more offenses, such as in the cases stated on page 6 of the brief on the other side; but we submit that all such instances and decisions of the courts in respect of such instances have no application to the case in hand.

In previous briefs on this subject we have repeatedly stated that a contempt of a court or of any other tribunal is a *crime*, and therefore subject to *punishment*. We think it needs no citation of authorities to establish this, which, indeed, is not disputed on the other side.

The question, then, is, What is a crime in the sense of its deserving and receiving punishment? It is submitted (as it has been in former briefs) that the very essence of crime embraces the idea of an offense against the *sovereign power*, and this is as true in morals and religion as it is in the philosophy of government and the theory of a State. This proposition, which we have so often stated heretofore, has, so far as we can discover, never been met or denied by the other side. Indeed, it may be considered as in the nature of an axiom in government.

Under the Constitution of the United States there is only

one sovereign. It is the single entity of the whole body of the people associated under the name of the United States. Neither Congress nor either of its Houses is sovereign. The Executive is not sovereign. The judicial courts are not sovereign. They are merely the *agents* and departments through which, each in its appointed way, the will of the people is declared, is executed and expounded by these three respective departments.

It follows, then, that there can be no crime, in the penal sense, committed either against Congress or either of its Houses or the Executive or the Judiciary. They may all be assailed in a thousand ways, but no such assault is, in the criminal sense, or can possibly be, a crime against either. It is solely an offense against the sovereign power, and as such can only be punished by the sovereign power according to the methods which the Constitution has established. A crime committed upon a person—as robbery or murder, for instance—is not a crime against the person, but it is a crime against the sovereign power which has found its means of perpetration in the person of one of the people the sovereign power has the right to protect.

4. The foregoing being too obvious for enlarged discussion, the question is whether the peaceful, respectful, and courteous omission of the witness before the Senate committee to answer a question proposed to him can be split into two offenses against the sovereign power.

A careful examination of each one of the cases cited in the brief on the other side will show that not one of those cases maintains any such doctrine. Some of them may and probably do imply that in a government where the legislative will is supreme a concurrent jurisdiction may exist in respect of two different tribunals for the punishment of contempts, as it may and often does for the punishment of other crimes.

5. It is submitted with confidence that under our Constitution whatever jurisdiction either House of Congress possesses cannot be divided or exercised concurrently by any other tribunal. In its very nature it is necessarily exclusive.

The foregoing proposition by no means implies that the law-making power may not in some cases provide aids to and regulations of the exercise of this power by the tribunal to which the Constitution has committed it, but this is not by any means clear in respect of tribunals like the Supreme Court of the United States and each House of Congress in respect of the exercise of the jurisdiction that the Constitution has committed to them. This point is referred to and commented upon in the case of Robinson, 19 Wall., p. 505, but it is not necessary for the purposes of this case to discuss this particular question, inasmuch as Congress has never attempted to regulate the action of the two Houses of Congress in this respect. If the act of 1857, instead of providing for independent proceedings by the judiciary, had provided, as the legislature of New York, for instance, did in respect of proceedings for the contempt of witnesses, &c., in its legislative houses, such a law might possibly have been considered as valid; but it did nothing of the kind, but the opposite, and it is believed that there is no other instance of any such legislation as the act of 1857, as applied to cases like the one in hand, and it is certain that during the forty years of the existence of this statute there has been no prosecution under the act, and (with one possible exception, which we have been unable to find) the two Houses of Congress have continually proceeded to exercise their jurisdiction in such cases without any reference to the statute, and that no case out of the very many that have arisen has until this one been attempted to be dealt with by the courts.

6. As has been stated in an earlier brief, if there were a concurrent jurisdiction over the same offense, the tribunal

first having possession of the subject would become one of exclusive jurisdiction, and in this case the Senate was already in the exercise of its jurisdiction and had the subject under consideration and undisposed of when the indictment in this case was found, and in fact it still has possession of it, and it may constitutionally and in consonance with its rules now take it up at any moment and punish the respondent (if he be found deserving of punishment) for the very same offense described in the very same terms for which he is now under the sentence of a court.

Suppose a jury should have acquitted Chapman on an immediate trial and while the Senate was yet in fact in the same session and engaged in considering what it should do in the premises, could it be maintained that the power of the Senate over the subject was gone?

7. As stated in a former brief, the Constitution provides, in language almost, if not absolutely, unique, that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." We take it that the word "subject" has its ordinary universal and dictionary meaning—that is, "*liable*." The Constitution does not stop by saying that he shall not be twice punished. It does not stop by saying that he shall not in fact be twice put in jeopardy—that is, on trial; but it *does* say that he shall not be *liable* to be put in jeopardy. There is no conceivable way of giving all these words their plain and due effect short of saying that the legislative power shall not provide for his being twice prosecuted. It follows, therefore, that if the Constitution has authorized the Senate to put him on trial and punish him (if he be found guilty), it is impossible for a statute to provide that he may be put on trial in another tribunal and punished by it. This is exactly what the statute purports to do, unless the statute can be construed as abolishing the right of the Senate to try at all, which, we take it, will not be insisted upon.

8. The brief on the other side omits to state under which of the Senate resolutions the committee was proceeding in asking Chapman the questions. As stated in former briefs, the resolution under which Chapman was interrogated related, in terms, *solely* to the point whether any Senator was speculating in sugar stocks, and without calling for or authorizing any report, as in the next resolution, respecting corrupt practices, was done. It is unnecessary to repeat what we have said on this subject in a former brief. It is sufficient, now, in reply, to simply state the proposition that a Senator had the same right to deal in stocks or any other commodity that any other citizen had, and that the rules of the two Houses were intentionally framed so as not to exclude members from their common rights as citizens by merely providing that no member should vote on any question in which he was directly and personally interested.

If this be so it clearly would not be "disorderly behavior" in a Senator to do so, and, therefore, there could be no right or power in the Senate to punish for that thing, however unwise it might be in a Senator to so act. The Senate, therefore, had no jurisdiction under the "disorderly behavior" clause of the Constitution to inquire into the conduct of its members respecting lawful transactions in which they had a perfect legal and constitutional right to engage, notwithstanding the pendency of the tariff bill, which might affect their business operations in common with those of other citizens.

9. The Constitution gives the Senate power to expel a member, and puts no limit of grounds or reasons, but only requires that two-thirds shall concur. The Senate has the *power* to expel a Senator for what it may think unwisdom, bad taste, unpopular opinion, and so forth, but it has no *right*, under the Constitution or otherwise, to do so. If this be so, then it is submitted that it is clear that Congress has no power to provide any means of aiding either House in

the exercise of unconstitutional tyranny, and that the courts, no matter how many statutes may require it, are under no obligation and have no right to assist in the exercise of such tyranny. We think this too clear for argument.

10. It is insisted, as stated in the former briefs, even if the statute can be interpreted or forced into a constitutional character, that with such character no offense could possibly have been committed until the witness should have refused to answer a question that the only tribunal having the constitutional power to ask it had required him to answer. It is perfectly clear, we think (as has been held in Massachusetts in respect of the legislative power to grant to the common council of a city the right to insist upon answers to questions and to punish for contempt), that Congress has no power to provide for the punishment of a witness who shall refuse to answer a question put under the authority of any of the executive or administrative departments of the Government until the witness shall have first had the opportunity to be heard in respect of his duty to answer before a tribunal that the Constitution has authorized to pass upon the question. In the case of all executive departments, and so forth, that tribunal must be a judicial one, and in the case of the Houses of Congress and State legislatures, and so forth, it must be the bodies *themselves* acting within the jurisdiction that the Constitution has imputed to them. (See Brimson's case, 154 U. S., 485; Whitcomb's case, 120 Mass., 118.) We insist, therefore, that Congress exceeded its power in undertaking to create a crime in a citizen who had declined to answer a question which the party or authority asking it could not finally pass upon.

The statute, therefore, viewed from this point, is contrary to the Constitution.

11. But if the statute can be construed and molded into one providing that the offense shall be complete when the

witness has defied the authority of the Senate itself, then the prosecution has no case, for neither the indictment nor the proof made any pretension that such a state of facts existed.

12. We insist upon what has been stated in the former brief, that the word "willfully" in the statute applies as well to the refusal to answer as it does to the refusal to appear, and that the allegation in the indictment that the refusal was "willful" was essential to the giving a criminal character to the act. The opposite of this was held by the courts below. We do not care to further discuss whether this point can be raised as a constitutional one or under the application for a certiorari. If we are right in supposing that the quality of willfulness was essential, we assume that this Court would not refuse a certiorari and thereby recognize the correctness of the judgment below in this most important particular.

13. It is settled both upon principle and authority that the powers of Congress in passing laws are limited to ends that are constitutionally legitimate and to forms and methods which are fairly, justly, and constitutionally appropriate to the attainment of such ends.

It is submitted that the act of Congress in question is invalid in both of these respects.

14. Finally, it is confidently submitted that, as this statute is confessedly unique, confessedly important, whether for good or ill, and, if valid, one that is to define what is necessary in the cases frequently arising in the two Houses of Congress, it is of the highest public importance that this Court should now (having the whole case before it on the *habeas corpus* and the petition for certiorari) settle every question of substance that has arisen in these transactions,

so that in the future the validity, scope, and construction of the constitutional powers of the Houses and power of Congress to make laws for the intervention of the judiciary in such cases, when made as they now stand, and that precisely what they mean should be clearly settled.

GEORGE F. EDMUNDS,
JEREMIAH M. WILSON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. ~~1896~~.

Office Supreme Court, U. S.
FILED.
MAR 8 1897
JAMES H. McKENNEY,
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Nos 175-176.

S. D. ANDREWS, W. H. WHITCOMB AND OCONTO CITY WATER SUPPLY COMPANY,
Appellants,

vs.

NATIONAL FOUNDRY & PIPE WORKS, LIMITED,
Appellee.

THE CITY OF OCONTO,
Appellant,

vs.

NATIONAL FOUNDRY & PIPE WORKS, LIMITED,
Appellee.

Nos. 283-286.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

GEORGE H. NOYES,
Solicitor for Petitioners.

THE EVENING WISCONSIN COMPANY, MILWAUKEE.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1896.

No. _____

S. D. ANDREWS, W. H. WHITCOMB AND OCONTO CITY WATER SUPPLY COMPANY,
Appellants,
vs.
NATIONAL FOUNDRY & PIPE WORKS, LIMITED,
Appellee.

THE CITY OF OCONTO,
Appellant,
vs.
NATIONAL FOUNDRY & PIPE WORKS, LIMITED,
Appellee.

Nos. 283-286.

Petition for Writ of Certiorari requiring the Circuit Court of Appeals for the Seventh Circuit to certify the above entitled cause to the Supreme Court for its review and determination.

To the Honorable Supreme Court of the United States of America:

The petition of the National Foundry & Pipe Works, Limited; Richard Wood, Walter Wood, Stuart Wood and George Wood constituting the firm of R. D. Wood & Company;

Chapman Valve Manufacturing Company; William Dickinson, John W. Dickinson, Courtland P. Dickinson, Jerome A. King and Ira C. Hutchins, constituting the firm of Dickinson Brothers & King; George W. Sherwood, B. Sutherland and George W. Oakes, constituting the firm of Sherwood, Sutherland & Company, and Thomas D. Cook and Edwin Hyde, constituting the firm of Cook & Hyde, for a writ of *certiorari* directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit under the provisions of Section 6 of the act of Congress approved March 3, 1891, and ordering that the records in a certain appeal be certified to this Honorable Court for its review and determination. Said appeal is entitled as follows: "In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1895, Nos. 283-286. S. D. Andrews, W. H. Whitcomb, and Oconto City Water Supply Company, Appellants, *vs.* National Foundry & Pipe Works, Limited, Appellee. The City of Oconto, Appellant, *vs.* National Foundry & Pipe Works, Limited, Appellee." And your petitioners respectfully show to this Honorable Court as follows:

First. Your petitioner, the National Foundry & Pipe Works, Limited, is, and at all times hereinafter mentioned was, a citizen of the State of Pennsylvania, and heretofore filed its certain bill in equity in the Circuit Court of the United States for the Eastern District of Wisconsin, on behalf of itself and all other creditors, against the Oconto Water Company, a corporation organized under the laws of the State of Wisconsin; Charles C. Garland, a citizen of Minnesota; S. D. Andrews and W. H. Whitcomb, citizens of the State of Maine; F. H. Todd, a citizen of Minnesota; George W. Sturtevant, Jr., a citizen of the State of Illinois; S. W. Ford, Matt S. Wheeler, A. J. Elkins and N. S. Todd, all citizens of the State of Wisconsin; the Minneapolis Trust Company, a corporation organized under the laws of Minnesota; the Oconto National Bank, a corporation organized under the banking laws of the Congress of the United States; the City of Oconto, a municipal corporation of the State of

Wisconsin, and the Oconto City Water Supply Company, a corporation organized under the laws of Wisconsin, and alleged in such bill in equity that the said National Foundry & Pipe Works, Limited, had recovered a judgment at law against the said defendant Oconto Water Company for the sum of $24,-250.04 in the Circuit Court of the United States for the Eastern District of Wisconsin, and that execution upon said judgment had been issued and returned unsatisfied; that the defendant Oconto Water Company was insolvent; that the defendants, Charles C. Garland and F. H. Todd had subscribed for 990 and 7 shares respectively out of 1,000 shares of the total capital stock of the said defendant Oconto Water Company; that certificates for such shares had been issued to them and by them assigned to S. D. Andrews and W. H. Whitcomb, and that the defendants F. H. Todd, George W. Sturtevant, Jr., and S. W. Ford were acting nominally as the directors of said corporation and said Sturtevant as its president; that the defendants S. D. Andrews and W. H. Whitcomb, Matt S. Wheeler, A. J. Elkins and N. S. Todd constituted all the stockholders of record of said corporation; but that Sturtevant and Todd claimed some interest in a portion of the stock; that the Minneapolis Trust Company was trustee under a certain deed of of trust executed by the defendant Oconto Water Company on the 1st day of November, 1890, upon the franchises and property of the Oconto Water Company to secure the issue of first mortgage bonds in the sum of $100,000; that the Oconto National Bank of Wisconsin claimed to hold a certain number of such bonds as pledgee from Andrews and Whitcomb; that the defendant Oconto City Water Supply Company had some interest in the premises as a subsequent purchaser from the defendant Oconto Water Company; that the defendants S. D. Andrews and W. H. Whitcomb had the sole management and control of the Oconto Water Company, and that they claimed liens upon the franchise, property and bonds of said Oconto Water Company through certain conveyances made by the

Oconto Water Company, which conveyances, it was alleged, were taken as secret liens and were fraudulent and void as against the creditors of such company. The bill further alleged that the stock and bonds of the company had been issued by it without consideration, and that Andrews and Whitcomb held the same without having paid therefor either in money, labor or property, as required by the statutes of Wisconsin. The prayer of the bill asked for a discovery and an accounting, and that all the stock, property and effects of the Oconto Water Company be sequestrated by the Court, and that some suitable person be appointed receiver of the corporation and of the property and of the rents, issues and profits of the water-works plant constructed by it; that the amounts remaining unpaid upon the capital stock held by the several defendants be ascertained, and that they be adjudged to pay the same; that the several instruments executed by the Oconto Water Company to Andrews and Whitcomb be adjudged to be fraudulent and void; that any lien or cloud upon the title caused thereby to the franchises and property of the company be removed, and that the property and unpaid stock subscriptions be declared a trust fund to be administered for the benefit of the complainant and all other creditors of the insolvent company; that the Court decree a just and fair distribution of its property among all its creditors, and that the complainant have such other, further and different relief as should be just and equitable.

The suit was brought to sequester and administer the property and capital stock as a trust fund of an insolvent corporation, collect in the unpaid subscriptions, remove all fraudulent or void liens upon its property, and distribute the assets of the company in accordance with the general provisions of the statutes of Wisconsin and in accordance with the principles of equity.

Coleman vs. White, 14 Wis., 700.
Powers vs. Hamilton P. Co., 60 Wis., 23.

Ballin vs. Loeb, 78 Wis., 404.
Ford vs. Plankinton Bank, 87 Wis., 363.
Richmond vs. Irons, 121 U. S., 27.

The defendants Oconto Water Company, S. D. Andrews, W. H. Whitcomb, George W. Sturtevant, Jr., S. W. Ford, Oconto National Bank, City of Oconto and Oconto City Water Supply Company entered an appearance in the action, but an answer was served only by Andrews and Whitcomb. This answer set out in detail the various proceedings of the Oconto Water Company during its organization, the instruments under which said defendants claimed to have obtained a lien on the franchises, stock and bonds of the Oconto Water Company, certain proceedings taken in the State Court purporting to foreclose their lien by decree and sale, the bidding in by them of the property at the sale, which property consisted of $100,000 of the capital stock and $100,000 of the first mortgage bonds of the Oconto Water Company, and the right by ordinance granted by the City of Oconto to the Oconto Water Company authorizing such company to use the streets of the City of Oconto for laying its water mains. The answer concludes with the prayer of the defendants "to be hence dismissed with their reasonable charges in this behalf most wrongfully sustained."

Second. During the proceedings the petitioners constituting the firm of R. D. Wood & Company filed an intervening petition to the effect that they had furnished certain hydrants to the Oconto Water Company which were used in the construction of its water-works plant in the City of Oconto, and that they claimed a mechanic's lien upon such plant for the amount of their claim, which lien had been decreed them by the United States Circuit Court for the Eastern District of Wisconsin upon the water-works plant constructed by the Oconto Water Company.

Third. The petitioner Chapman Valve Mfg. Company filed an intervening petition setting up the recovery of a judgment

in its favor against the Oconto Water Company for certain valves which were used in the construction of the water plant at Oconto.

Fourth. The intervening petitioners constituting the firm of Dickinson Brothers & King, Sherwood, Sutherland & Company and Cook & Hyde also filed intervening petitions respectively in the proceedings, setting forth an indebtedness to them by the Oconto Water Company on account of materials furnished to such company in the construction of its plant at Oconto. Due proof was made of all the claims of the intervening petitioners.

Fifth. During the course of the proceedings the complainant was permitted to amend its bill of complaint by alleging that subsequent to the filing of such bill it had obtained in the United States Circuit Court for the Eastern District of Wisconsin, in another suit, a mechanic's lien against the property and franchises of the Oconto Water Company for the pipes furnished and used in the construction of the water plant, which it asked to be permitted to prove as a secured claim in the pending suit. Due proof of the same was made.

Sixth. On motion of the complainant, Albert E. Smith was appointed receiver of the property and effects of the Oconto Water Company, with authority to take possession of, operate and control the same. An injunction was also issued restraining the defendants Oconto Water Company, Andrews and Whitcomb, City of Oconto and Oconto City Water Supply Company from interfering with the franchises and property of the Oconto Water Company in the hands of the receiver.

The opinion of Judge Jenkins in the Circuit Court on the appointment of the receiver is reported in 52 Fed. Rep., 29. It was there decided that Andrews and Whitcomb acquired no right or title to the water plant by virtue of their mortgage from the Oconto Water Company purporting to cover merely the right granted to it by the City of Oconto.

An appeal was taken from such order to the United States Circuit Court of Appeals by Andrews and Whitcomb

and the case reported in 61 Fed. Rep., 782. It was there held that the Oconto Water Company received such rights from the City of Oconto as were capable of being mortgaged, and the order granting the injunction in the court below was set aside.

A petition for rehearing was overruled, and the opinion reported in 61 F. R., 789.

The receiver, upon his appointment, took possession of the water plant, and operated it for about two years, until the mandate from the Court of Appeals was sent down, whereupon the Court below ordered the plant to be turned over to the defendant Oconto City Water Supply Company during the pendency of the suit and subject to the further order of the Court, all of which was done without prejudice to the adjudication of the rights of the parties at the final hearing.

Seventh. The record shows that in the suit commenced in the United States Circuit Court for the Eastern District of Wisconsin by the complainant for the foreclosure of its mechanic's lien for furnishing pipe for the construction of the plant, a decree was entered giving a lien upon the plant, together with the franchise of operating the same as an incident thereto, ordering sale thereof and the deposit of the proceeds of sale in the registry of the court for the benefit of the parties who might show right thereto. The opinion of Circuit Judge Jenkins in deciding the case is reported in 52 F. R., 93. An appeal was taken therefrom by the Oconto Water Company, the only defendant in the case, to the United States Circuit Court of Appeals, and the case there heard before Woods, Circuit Judge, and Bunn and Baker, District Judges. The Court adopted and concurred in the opinion and conclusion of Judge Jenkins and thereupon affirmed the decree of the Court below. (See 59 F. R., 19.)

Eighth. The ground of the decision in the mechanic's lien foreclosure suit was substantially that under the public policy prevailing in the State of Wisconsin from an early day, mechanics' liens were enforceable against the property of a quasi-

public corporation the same as against any other party, as had been determined in cases enforcing liens against the property of railroad corporations, and that water companies belonged to the same class of quasi-public corporations. At the time of the decisions in the Federal Courts the Supreme Court of the state had not decided the question in a case involving mechanics' liens against a water-works corporation.

Ninth. Upon the hearing of the case at bar in the Circuit Court a final decree was entered adjudging that

(1) The defendant Oconto Water Company was insolvent, and that all its stock, property and effects be sequestered and that a distribution of the same or of the proceeds of the sale thereof be made among its creditors according to law and in the order of their priority.

(2) That the National Foundry and Pipe Works, Limited, and R. D. Wood & Company had liens upon all the rights, franchises, property and plant of the Oconto Water Company, as provided in the mechanics' lien decrees which had been rendered.

(3) That the defendants Andrews and Whitcomb were privies to and concluded by such mechanics' lien decrees, although they were not parties of record.

(4) That such mechanics' lien decrees were *prior* to the lien of the instrument claimed to be a mortgage under which the defendants Andrews and Whitcomb asserted a lien upon and title to the franchises and property of the Oconto Water Company.

(5) That such holders of the mechanics' lien decrees be authorized to proceed to the enforcement of the same in accordance with their terms. (Upon application of Andrews and Whitcomb an order had been entered in the cause restraining the complainant from proceeding to the enforcement of its mechanic's lien decree until the final hearing thereof.)

(6) That the defendants Andrews and Whitcomb were stockholders of the Oconto Water Company, holding the entire

amount of $100,000 of its capital stock, which had been issued by the company and assigned to them without any consideration having been paid therefor by any one, and which stock they had received with knowledge thereof, and that they were liable for all unpaid amounts upon such stock so far as might be necessary to discharge the indebtedness of the Oconto Water Company not exceeding the sum of $100,000.

(7) That the defendant Oconto Water Company was indebted to the intervening petitioner Chapman Valve Manufacturing Company for the amount of its judgment, to the intervening petitioners Sherwood, Sutherland & Company for the amount of their claim, to the intervening petitioners Dickinson Bros. & King for the amount of their claim, and to the intervening petitioners Cook & Hyde for the amount of their claim.

(8) That Andrews and Whitcomb pay the amounts adjudged due to the above mentioned unsecured creditors, and also that they "pay any deficiency that may be found due to said creditors, to-wit, the said National Foundry & Pipe Works, Limited, and the said R. D. Wood & Company, if any there shall be, after applying to the satisfaction of their respective mechanics' lien decrees hereinbefore referred to the proceeds of the sales made thereunder, the amount of such deficiency being made to appear to the satisfaction of this Court, and an order for such payment entered at the foot of this decree."

(9) That the bonds issued by the Oconto Water Company secured by its mortgage deed to Minneapolis Trust Company were issued contrary to the statutes of Wisconsin and were void, and that the defendants Andrews and Whitcomb deliver the same up to be cancelled.

(10) That the instruments executed in the name of the Oconto Water Company to Andrews and Whitcomb "were made in good faith and for a valuable consideration, and were not withheld from record with their procurement nor with their consent nor in fraud of creditors."

(11) That the compensation for services and the disbursements of Albert E. Smith, receiver, and of his counsel, be fixed at the sum of $5,500 and that the same, after deducting $3,000 retained by him under the order of the Court, be paid to him by the defendant Oconto City Water Supply Company.

(12) That the complainant recover of Andrews and Whitcomb its costs, taxed at $254.10.

Tenth. The opinion of Circuit Judge Jenkins upon the final hearing is reported in 68 Fed. Rep., 1006.

Eleventh. The defendants Andrews and Whitcomb and Oconto City Water Supply Company prayed a joint appeal from such decree, which was allowed, and a citation was issued by them addressed "To the National Foundry & Pipe Works, Limited, Richard Wood, Walter Wood, Stuart Wood, Chapman Valve Manufacturing Company, Sherwood, Sutherland & Co., Dickinson Brothers & King and Cook & Hyde," the service of which citation was accepted by the solicitors for the National Foundry & Pipe Works, Limited, and the Chapman Valve Manufacturing Company only.

Twelfth. At a later date the City of Oconto prayed an appeal, which was allowed, and a citation thereupon issued directed "To the National Foundry & Pipe Works, Limited, and Richard Wood, Walter Wood, Stuart Wood and George Wood," service of which citation was accepted by the solicitors for the National Foundry & Pipe Works, Limited, and the solicitors for Richard, Walter, Stuart and George Wood.

Thirteenth. The following were the assignments of error:

(1) "THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, *Complainant,*

vs.

OCONTO WATER COMPANY, S. D. ANDREWS, W. H. WHITCOMB, CHAS. C. GARLAND, F. H. TODD, GEO. W. STURTEVANT, JR., S. W. FORD, MATT S. WHEELER, A. J. ELKINS, N. S. TODD, MINNEAPOLIS TRUST COMPANY, OCONTO NATIONAL BANK, CITY OF OCONTO and OCONTO CITY WATER SUPPLY COMPANY, *Defendants.* } In Equity.

And now, on the .... day of July, A. D. 1895, came the said defendants S. D. Andrews, W. H. Whitcomb and Oconto City Water Supply Company, by Messrs. Webster & Martineau, their solicitors, and say that the decree in said cause is erroneous and against the just rights of said defendants for the following reasons:

First. Because the evidence shows that the said defendants S. D. Andrews and W. H. Whitcomb were not privies to or concluded or in any way affected, either themselves or their rights, by either of the mechanics' lien decrees referred to in the third paragraph of said decree.

Second. Because the evidence fails to show any lien in favor of the complainant or the intervening petitioners herein, R. D. Wood & Company, upon any of the rights, franchises or property of or upon the plant constructed by Oconto Water Company in the City of Oconto.

Third. Because the evidence shows that the liens acquired by said defendants S. D. Andrews and W. H. Whitcomb upon the franchises and plant constructed in said City of Oconto by

Oconto Water Company were superior and paramount to any and all other liens upon or rights in said property, and that they made title to said property through such liens, and that they, or their grantee, the defendant Oconto City Water Supply Company, have ever since such title was made held the same free and clear of all liens.

Fourth. Because the evidence shows that said defendants S. D. Andrews and W. H. Whitcomb never became stockholders of said defendant Oconto Water Company.

Fifth. Because the evidence shows that, if there was ever any valid issue of any stock of the defendant Oconto Water Company, it was either full-paid stock before coming into the hands of Andrews and Whitcomb, or, if not then full, was at least part, paid stock, and the evidence fails to show the amount then remaining unpaid.

Sixth. Because the evidence shows that the receiver was not entitled to any compensation for services or counsel fees out of any of the moneys arising from the operation of the water plant by the receiver.

Seventh. Because the evidence shows the complainant to be entitled to no relief as to the bonds mentioned in the twelfth paragraph of the decree.

Eighth. Because the mechanic lien laws of Wisconsin gave no lien upon the franchises or plant of Oconto Water Company.

July 23, 1895.

(Signed) WEBSTER & MARTINEAU,
Solicitors for said Defendants.

W. H. WEBSTER, *of Counsel.*"

(2) "And now, on the 27th day of September, A. D. 1895, came the said defendant City of Oconto, by Messrs. Webster and Martineau, its solicitors, and says that the decree in said cause, so far as it allows the enforcement and execution of the 'lien decrees' therein mentioned in the third paragraph, is erroneous and against the just rights of this defendant for the following reasons:

First. Because the evidence shows that this defendant was not privy to or concluded or in any way affected by either of the mechanic lien decrees referred to in the third paragraph of said decree.

Second. Because the evidence fails to show any lien in favor of the complainant or the intervening petitioners herein, R. D. Wood & Co., upon any of the rights, franchises or property of, or upon the plant constructed by, Oconto Water Company in the City of Oconto.

Third. Because the mechanic's lien laws of Wisconsin give no lien upon the franchises or plant constructed by Oconto Water Company in the City of Oconto.

September 27th, 1895.

WEBSTER & MARTIN
Solicitors for Defendant, City
W. H. WEBSTER, *of Counsel.*"

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Thirteenth. A motion to dismiss the appeal in the United States Circuit Court of Appeals was made upon the following notice:

"Please take notice that we shall move said Court at the court rooms in the City of Chicago, Illinois, on the 4th day of February, A. D. 1896, at the opening of court, or as soon thereafter as counsel can be heard, to dismiss the appeal of said appellants from the decree entered in the United States Circuit Court for the Eastern District of Wisconsin, on the 17th day of July, A. D. 1895, in a cause entitled National Foundry & Pipe Works, Limited, complainant, *vs.* Oconto Water Company and others, defendants, upon the ground that the appeal herein will not lie from the decree so entered.

To W. H. WEBSTER, ESQ.,
Counsel for Appellants.

GEORGE H. NOYES,
Counsel for Appellee National Foundry & Pipe Works, Limited.
W. D. VAN DYKE,
Counsel for Appellee R. D. Wood & Company."

The opinion denying the motion to dismiss is reported in 73 Fed. Rep., 516.

Fifteenth. The United States Circuit Court of Appeals handed down its opinion upon the hearing of the case in that court October 5, 1896, reversing the decree of the lower Court "with direction to dismiss the bill for want of equity." (76 F. R., 166.)

Sixteenth. A petition for rehearing, with request for certification of the questions involved to the Supreme Court, was filed, which petition was denied. The opinion of Woods, Circuit Judge, on such rehearing appears in the certified copy of the record in the court below, and has not yet been reported. At the conclusion of such opinion it is said: "In case a rehearing is denied, we are asked to certify all questions involved to the Supreme Court. This Court is authorized to certify to that Court 'any questions or propositions of law concerning which it desires the instruction of that Court for the proper decision,' but that is done before we decide, and only upon our own motion. *Louisville Ry. Co. vs. Pope*, 74 Fed. Rep., 1. *It is the privilege of the appellees to move the Supreme Court for an order requiring the case to be certified to that Court for its review and determination.*"

Seventeenth. Your petitioners therefore request that a writ of *certiorari* be issued, so that this Honorable Court may review the record in the court below, and determine questions affecting the rights of these petitioners, which are questions and rights in which the public is very largely interested, and also settle the conflict of decisions not only between the state and federal courts sitting in Wisconsin, but between the conflicting decisions of the United States Circuit Court of Appeals for the Seventh Circuit and the conflicting decisions between that Court and the U. S. Circuit Court of Appeals for other circuits, and between the decisions of that Court and the Supreme Court of the United States. By reason of this conflict of decisions, your petitioners, who are largely interested in

furnishing materials, consisting of pipe, hydrants, valves, engines, cement, etc., for the construction of water-works plants, not only in Wisconsin but many other states, are uncertain as to the law and their rights with reference to the securing and enforcement of mechanics' liens against the property of quasi-public corporations, particularly of water-works corporations, in Wisconsin and elsewhere, and also with reference to the enforcement of their claims against the stockholders of insolvent corporations, and your petitioners respectfully submit that in such a condition of conflicting decisions and in a matter of such public concern, and in a matter in which they are so largely affected, it is the province of this Honorable Court to review and consider the record, and that without such correction by this Honorable Court your petitioners are remediless.

Eighteenth. Your petitioners further show that they are informed and believe, and do therefore respectfully represent, and submit, that there are good reasons why the judgment of said Circuit Court of Appeals for the Seventh Circuit should not be allowed to stand as the final judgment in this cause, but that the record herein made should be reviewed, and this cause finally determined by this Honorable Court, and they therefore present this their petition to that end, and in support thereof assign (among other reasons which will be more apparent from an examination of the record and from the brief to be submitted) the following especial reasons:

(1) The United States Circuit Court of Appeals for the Seventh Circuit should have dismissed the appeal herein for want of jurisdiction for three reasons: First, certain parties to the record who had an interest in the decree, particularly the Oconto Water Company, Albert E. Smith, its receiver, and the defendants Sturtevant, Todd and Ford, did not join in the appeal, nor was there any application for summons and severance as to any of them, or any equivalent therefor, nor any request to appeal, nor any order permitting severance, nor did said defendants or any of them appear in said Court of Appeals.

Secondly, because the citation was directed to the firms of Dickinson Brothers & King, Sherwood, Sutherland & Company, and Cook & Hyde instead of to the individual members thereof, and the appeal bond ran to such firms as obligees, and no amendment of these or any similar defects in the proceedings to appeal was made. Third, the decree was not final, because there was something more than the mere ministerial execution of the decree as entered to be done in order to determine the full and final liability of Andrews and Whitcomb. After the sale under the mechanics' lien decrees, judicial action was required to ascertain what, if any, deficiency remained of the indebtedness due to the complainant and R. D. Wood & Company, and the judicial action of the Court below was necessary in order to determine and create the individual liability of Andrews and Whitcomb for the amount of such deficiency.

(2) The Court of Appeals for the Seventh Circuit erroneously held that it must "follow without further inquiry" the decision of the Supreme Court of the State of Wisconsin in the subsequent case of Chapman Valve Manufacturing Company *vs.* Oconto Water Company, 89 Wis., 264, instead of adhering to its prior decision of the same question in Oconto Water Works Company *vs.* National Foundry & Pipe Works, Limited, 59 F. R., 19. It refused to follow the principle claimed to be applicable to the complainant as stated in the leading case of Burgess *vs.* Seligman, 107 U. S., 20, affirmed among others in the recent case in this Court of Folsom *vs.* Ninety-six, 159 U. S., 611, as follows: "When contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued." "As, however, the very object of giving to the national courts jurisdic-

tion to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." It refused to follow the rule adopted by it in Forsyth *vs.* City of Hammond, 18 C. C. A., 175. It laid down a rule in conflict with the Circuit Court of Appeals for the Sixth Circuit in Louisville Trust Co. *vs.* City of Cincinnati, decided October 15, 1896, (76 Fed. Rep., 296). It refused to protect a citizen of another state to whom it had already given by its decree a vested right in the property and franchises of the Oconto Water Company, and yielded its independent judgment to the destruction of rights which had accrued under the contract which the complainant had entered into prior to the decision of the state court in a case to which the complainant was not a party.

(3) The Court of Appeals of the Seventh Circuit erroneously decided that the so-called mortgage upon the right granted by the ordinance passed by the City of Oconto permitting tihe Oconto Water Company to lay its pipes in the streets in the City of Oconto carried with it the water plant itself, thereafter constructed, and all tangible property which the Oconto Water Company acquired subsequent to the execution of such mortgage and the entire franchises of the corporation, although the mortgage did not by its terms cover or purport to cover such water plant or any tangible property or property of any kind acquired subsequent to its execution or the franchises from the state to construct and operate the plant. It approved the doctrine that the franchise of a corporation is the principal thing, and its tangible property is but an incident thereto, and passes therewith by sale or mortgage, which rule is claimed by petitioners to be in conflict with the rule laid down by this Honorable Court in the case of *Monongahela N. Co. vs. U. S.*, 148 U. S., 312, and earlier cases, in which it

was decided that the transfer of the property of a quasi-public corporation carries with it as an incident the franchise to use and operate it. The Court of Appeals laid down a rule in conflict with its prior decision in the mechanic's lien case of the complainant in 59 Fed. Rep., 19, adopting the opinion of Judge Jenkins in 52 Fed. Rep., 43, wherein it was held that the Oconto Water Company was deemed " by its act of devoting this plant to public use under its franchise, thereby rendering it inseparable therefrom, to have assented that upon its sale, voluntary or involuntary, the franchise to operate should pass with it." This last named decision has not been overruled by the Court of Appeals for the Seventh Circuit, and it is claimed should now be considered as the law of the case so far as the rights of the complainant are concerned in the property and franchises of the Oconto Water Company and so far as the Oconto Water Company is concerned as mortgagor to Andrews and Whitcomb, mortgagees, holding a subsequent encumbrance.

(4) The Court of Appeals for the Seventh Circuit erred in its refusal to enforce the liability of Andrews and Whitcomb as stockholders under the statutes of Wisconsin and the decisions of the Supreme Court of that state construing the statutes applicable to organization of corporations and the liability of stockholders thereunder. The Court of Appeals erroneously held or assumed that the stock book of the corporation was not controlling evidence as to who constituted the stockholders of the Oconto Water Company, and that Andrews and Whitcomb, who appeared on such stock books as stockholders, were not liable to creditors because there had been a contract between them and the Oconto Water Company whereby it had agreed to pledge to them its stock and that they received and held such stock as pledgees of the corporation instead of assignees of the stock from Charles C. Garland and F. H. Todd, to whom it was issued by the Oconto Water Company in discharge of their subscription for stock. By this holding Andrews and Whitcomb were relieved from all liability as stockholders, although

they held and claimed to own all the stock of the company, for which neither they nor the original subscribers had paid any consideration, and by means of which they exercised exclusive control and management of the affairs of the corporation.

(5) The Court of Appeals for the Seventh Circuit erroneously decided that the bonds issued by the Oconto Water Company without the payment in money or property of seventy-five per cent. of their face value were not issued in violation of Section 1753, R. S. of Wisconsin, which declares that all such bonds so issued shall be void.

(6) The Court of Appeals for the Seventh Circuit erred in its direction to dismiss the bill of the complainant for want of equity, while it affirmed that portion of the decree adjudging that the Oconto City Water Supply Company should pay to Albert E. Smith, receiver, the sum of $5,500 for his services and disbursements in operating the water plant during the two years of the pendency of the litigation. It also erred in dismissing the bill for want of equity because the complainant as judgment creditor with execution returned unsatisfied had the right to invoke the aid of the Court to have the property and capital stock of the Oconto Water Company sequestrated and distributed among its creditors, and also to compel the stockholders of such company to pay in any amounts remaining unpaid upon the stock held by them, even though it should be determined that Andrews and Whitcomb were not the parties liable as such stockholders.

Other errors, though material and believed to be well founded, appear from the certified copy of the transcript of record in the court below, and can best be made to appear by printed brief and by oral argument before this Caurt.

A certified copy of the transcript of the record in this case is herewith filed as a part of this application for a writ of *certiorari*.

WHEREFORE your petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this

Court directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, and therein entitled Nos. 283-286, S. D. Andrews, W. H. Whitcomb and Oconto City Water Supply Co., Appellants, *vs.* National Foundry & Pipe Works, Limited, Appellees; the City of Oconto, Appellant, *vs.* National Foundry & Pipe Works, Limited, Appellee, to the end that the said case may be reviewed and determined by this court as provided in Section 6 of the act of Congress entitled "An act to establish circuit courts of appeal and to define and to regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief in the premises as to this Court may seem proper, and that said decree of the Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray, etc.

NATIONAL FOUNDRY & PIPE WORKS, LIMITED,
RICHARD WOOD, WALTER WOOD, STUART WOOD;
GEORGE WOOD;
CHAPMAN VALVE MANUFACTURING COMPANY;
WILLIAM DICKINSON, JOHN W. DICKINSON,
CORTLAND P. DICKINSON, JEROME A. KING and
IRA C. HUTCHINS; GEORGE W. SHERWOOD,
B. SUTHERLAND and GEORGE W. OAKES; THOMAS
D. COOK and EDWIN HYDE,

Petitioners.

By GEO. H. NOYES,

Their Counsel.

UNITED STATES OF AMERICA, } ss.
EASTERN DISTRICT OF WISCONSIN. }

GEORGE H. NOYES, being duly sworn, says that he is one of the solicitors and of counsel for the above-named petitioners, and makes this verification on their behalf; that he has read the above and foregoing petition, and that the facts stated therein are true to the best of his knowledge, information and belief.

GEO. H. NOYES.

Subscribed and sworn to before me this 27th day of February, 1897.

{ Notarial Seal. }

M. A. MCCABE,
Notary Public, Milwaukee County, Wisconsin.

166-721 24

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1896.

Supreme Court, U. S.
FILED.
APR 13 1897
JAMES H. McKENNEY,
CLERK.

Nos. 725-726.

S. D. ANDREWS, W. H. WHITCOMB AND OCONTO CITY WATER SUPPLY COMPANY,
Appellants,
vs.
NATIONAL FOUNDRY & PIPE WORKS, LIMITED,
Appellee.

Nos. 283-286.

THE CITY OF OCONTO,
Appellant,
vs.
NATIONAL FOUNDRY & PIPE WORKS, LIMITED,
Appellee.

Preliminary Brief for Petitioners on Application for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

GEORGE H. NOYES,
Counsel for Petitioners.

THE EVENING WISCONSIN COMPANY, MILWAUKEE.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1896.

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S. D. ANDREWS, W. H. WHITCOMB AND OCONTO CITY WATER SUPPLY COMPANY,
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Nos. 283-286.

THE CITY OF OCONTO,
Appellant,
vs.
NATIONAL FOUNDRY & PIPE WORKS, LIMITED,
Appellee.

Preliminary Brief for Petitioners on Application for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

The Oconto Water Company was organized under the general statutes of the State of Wisconsin, with a capital stock of $100,000, by recording articles of association on the 8th day of July, 1890, "for the purpose of constructing and operating water works in the City of Oconto, Wisconsin, for supplying

said city and its inhabitants with water for protection against fire and for domestic and other purposes. The said corporation shall have power and authority to acquire and hold, sell and convey, at its pleasure, any such estate, real, personal or mixed, as may be necessary or proper for the benefit or advantage of such corporation, and have, enjoy and possess all the powers and privileges necessary or incident to the business and purposes of such corporation."

The charter of the company was perpetual.

On the 9th day of July, 1890, an ordinance was adopted by the Common Council of Oconto authorizing the Oconto Water Company to construct, own, maintain and operate water works in the City of Oconto, and to lay pipes for the carrying and distributing of water in any of the streets, alleys and public grounds of said city, the price to be charged to the city and its inhabitants for water being therein designated.

The rights under the ordinance were to remain in force and effect for thirty years.

On July 15, 1890, subscription was made to the entire capital stock of the Oconto Water Company by C. C. Garland for 990 shares, F. H. Todd for 7 shares, F. B. Barnes 1 share, J. W. McCabe 1 share and W. E. Krippene 1 share, and thereupon Garland, Todd and Barnes were elected directors, with Garland as president and Todd secretary of the company. A meeting of the stockholders was held on July 15th, at which a resolution was adopted that the directors be authorized to purchase the necessary real estate at the City of Oconto for the uses of the company, and also to receive proposals and contract for the construction of such buildings and works as might be necessary for the water works. No other proceedings by the stockholders, and no action of the board of directors were taken in regard to borrowing money or purchasing real estate or constructing the works, until October 29, 1890.

On or about the 28th day of August, 1890, the Oconto Water Company, by its officers, entered into a contract with the Na-

tional Foundry & Pipe Works, Limited, of Scottdale, Pennsylvania, for the furnishing of pipe for the plant, the terms of payment for which were to be one-third cash thirty days from date of delivery at Oconto and the balance in four months from such date. Pipe was delivered at various dates, the date of the first delivery being September 8th, 1890, and the last November 24th, 1890. The balance due of the purchase price of the pipe amounted to upwards of $24,000. The Oconto Water Company purchased, for the plant, hydrants of R. D. Wood & Company, Sept. 17, 1890; valves of the Chapman Valve Mfg. Co., September 17th and October 4th, 1890; cement of Dickinson Bros. & King, Dec. 29, 1890, and Feb. 4, 1891; stone of Cook & Hyde, Jan. 10, 1891, and machinery of Sherwood, Sutherland & Co. between Sept. 29, 1890, and Jan. 30, 1891, amounting in the aggregate to upwards of $4,500. All this material went into the construction of the water works plant. Work was commenced on this plant on the 15th day of September, 1890, being the date fixed by the mechanics' lien decrees subsequently obtained by the National Foundry & Pipe Works, Limited, and R. D. Wood & Company.

After the date of the commencement of the work of construction on the plant the Oconto Water Company executed to Andrews and Whitcomb, of Norway, Maine, in consideration of a loan thereafter to be made, payable in installments, of a sum not exceeding $40,000, an instrument whereby it assigned to them as collateral security, *first*, all the rights and privileges "which were granted unto the said Oconto Water Company in and by a certain ordinance passed by the City of Oconto, Wisconsin, and approved by the mayor of said city July 9, 1890;" *second*, $100,000 of its capital stock, and, *third*, $100,000 of its first mortgage bonds. This instrument, claimed as a mortgage, was not put on record until Jan. 18, 1891, and none of the creditors above named furnishing material had any knowledge or notice of it at the time they made their contract or delivered the material, and it appears that they would not have sold or

delivered said material had they known of its existence, but that they relied upon the property of the Oconto Water Company being free and clear from all encumbrances.

On the other hand, Andrews and Whitcomb had knowledge that these creditors were furnishing material for the construction of the plant and, before they had made all their advances under their contract, had notice that such materials were not being paid for.

On the first day of October, 1890, as soon as the Oconto Water Company had procured its stock certificate book it issued its entire capital stock in accordance with the subscription as follows: 1 share of stock to F. B. Barnes, 1 share to J. W. McCabe, 1 share to W. E. Crippene, 7 shares to F. H. Todd, 490 shares to C. C. Garland, and on the 2d day of October 500 additional shares to C. C. Garland. On the 2d of October Garland sent by letter to Andrews and Whitcomb at Norway, Maine, the certificates for 997 shares, issued to him and Todd, saying he enclosed such certificates transferred in blank, and would have put in Andrews and Whitcomb's name in the power of attorney, but thought they might want to use them as collateral, in which case it would be better for them to have the certificates in blank, and saying further that the other three shares issued to the original incorporators would be transferred to him and retained for the purposes of the incorporation. In reply to this communication, Andrews and Whitcomb on October 7, 1890, wrote that they returned such certificates as they were of no value to them as security in their present shape. They said "the stock should be issued to us direct, for the reason that the *company's books now show this stock to be yours and not ours*, and should trouble arise could be attached and held as *your property*. Our object in having you and Mr. Todd hold a small amount of stock was to keep the organization all right. Mr. Andrews will be on the ground to represent this stock at any meeting that may be held or he will give proxy. I think you will comprehend the situation without further explanation." On re-

ceipt of this letter the names of Andrews and Whitcomb were inserted in the power of attorney endorsed on the back of the certificates, the certificates surrendered and cancelled, and on the 18th day of October, new certificates running to Andrews and Whitcomb were issued and sent by Garland to them at Norway. These certificates have ever since been held by Andrews and Whitcomb, except they were at one time endorsed and pledged by Andrews and Whitcomb to the Oconto National Bank, which held the same to secure a loan by Andrews and Whitcomb.

About the 20th of December, 1890, Mr. Whitcomb, for Andrews and Whitcomb, becoming alarmed lest they might be liable to creditors on account of holding the stock, directed Mr. Todd, as secretary of the company, to endorse on the stubs of the certificate of stock book the statement that 990 shares *were owned* by Garland, seven shares *were owned* by F. H. Todd, and issued to Andrews and Whitcomb as collateral.

At the various meetings held by the stockholders of the Oconto Water Company, from the time of its incorporation to some time in January, 1891, the record book shows that Garland held and voted the 990 shares of stock, and Todd the seven shares.

On Jan. 15, 1891, for a consideration furnished by Andrews and Whitcomb, Garland executed a writing assigning his interest in the stock of the company to Geo. W. Sturtevant, Jr., who was thereupon elected a director and president of the company in place of Garland, and after that time appears on the record but not the stock book as holding and voting 990 shares of the stock. Sturtevant paid nothing and acted only for Andrews and Whitcomb.

Some time in June, 1891, Andrews and Whitcomb, by Mr. Webster, their solicitor, commenced in the State court an action to compel a sale of the franchise, stock and bonds under the instrument of assignment, or mortgage, and also under a subse-

quent instrument, executed in March, 1891, making the Oconto Water Company sole defendant in such suit. A decree was entered on the 13th of August, 1891, and on the 12th of September, 1891, the franchise and the $100,000 of stock and the $100,000 of bonds were bid in by Andrews and Whitcomb, who claimed thereby to have become the owners thereof and of the water plant then in process of construction.

The water plant was not completed and put in operation, nor accepted by the city until the 28th of September, 1891, at which date the Oconto Water Company informed the Council that it had completed the water works system and asked an acceptance thereof.

On the 28th of January, 1891, the National Foundry & Pipe Works, Limited, filed in the proper office a notice and petition for a lien against the pipe and water works plant "and upon all the right, title and interest which said Oconto Water Company had in and to said premises upon which said plant and well are situated, and to which said pipes are connected," for the amount of its claim. R. D. Wood & Co. filed a similar petition. On Feb. 3, 1891, the National Foundry & Pipe Works, Limited, commenced a suit in equity in the United States Circuit Court for the Eastern District of Wisconsin, against the Oconto Water Company to foreclose its lien, in which suit the defendant, by Mr. Webster, its solicitor, filed an answer that it contracted in writing with Garland, for the considerations mentioned in a contract, to construct the water works, and that Garland, and not itself, purchased the material used therefor. The contract referred to was dated Sept. 17, 1890, and was copied into the record book of the Oconto Water Company. By this contract Garland, in consideration of the issue of the $99,000 of stock to him to be taken in payment of his subscription therefor, and $100,000 of the first mortgage bonds of the company, agreed to construct and equip the water plant in accordance with the terms of the ordinance. A decree was entered in the mechanic's lien

suit, October 3d, 1892, establishing in the complainant a lien upon the entire water works plant of the defendant, commencing September 15, 1890, and upon the interest which the defendant had in and to the real estate upon which the plant was constructed, and directing that the entire water works plant "and the franchise of maintaining said plant for the uses to which it is devoted by the law of its incorporation, as an entirety," be sold at public auction; that the proceeds of sale be brought "into the registry of this court for distribution among all who may show right thereto, and subject to the order of the Court thereon." A similar mechanic's lien decree was obtained by R. D. Wood & Co.

On the 2d day of January, 1892, in another suit begun in the United States Circuit Court for the Eastern District of Wisconsin, the complainant recovered a judgment at law against the Oconto Water Company, and issued execution upon such judgment, which was returned unsatisfied. Thereupon, on Jan. 18, 1892, the complaintant commenced, in the United States Circuit Court for the Eastern District of Wisconsin, this suit to sequester and administer the property and capital stock as a trust fund of the Oconto Water Company as an insolvent corporation, collect in the unpaid subscriptions to the capital stock, remove all fraudulent or void liens upon its property and distribute the assets in accordance with the provisions of the statutes of Wisconsin and the principles of equity covering such cases.

Coleman vs. White, 14 Wis., 700.
Powers vs. Hamilton P. Co., 60 Wis., 23.
Ballin vs. Loeb, 78 Wis., 404.
Ford vs. Plankinton Bank, 87 Wis., 363.
Richmond vs. Irons, 121 U. S., 27.
Mellen vs. Iron Works, 131 U. S., 352.

By leave of Court, appropriate allegations were added to the

pleadings under which the mechanics' lien creditors proved up their decrees as secured claims.

South. Ry. Co. vs. Bouknight (C. C. Ap., 4th Cir.), 70 Fed., 442-8.

Some additional facts will be stated in subsequent parts of this brief as they bear upon the propositions of law discussed.

The various proceedings taken in the suit and its progress through the lower court to the Court of Appeals are briefly stated in the petition for writ of certiorari, to which we respectfully beg to refer, and ask that the same be read here instead of being again set forth in full in this preliminary brief.

The decison of the Court of Appeals, if sustained, will defeat the collection of the claims of all the material men, whose property contributed to the construction of a valuable plant, and without whose property such plant would not have been constructed, and such decision gives the entire plant and its rentals to the holders of a mortgage which was executed by a corporation at the time insolvent and held as a secret lien by those interested in the management of the property, and who now claim to own the whole through collusive legal proceedings in the State Court.

The record shows the water plant to be worth at least a hundred thousand dollars, sufficient in value to secure the payment of all creditors, both material men and mortgagees, who contributed to its construction.

(See Appellant's Answer, Record, p. 75.)

I.

The Court of Appeals Should Have Dismissed the Appeals for Want of Jurisdiction.

(1) The decree below was a joint decree. The suit was one in equity, brought on behalf of the complainant and all other

creditors against the Oconto Water Company as an insolvent corporation, to appoint a receiver, to discover and sequestrate its property and for an accounting with repsect thereto, the removal of all fraudulent liens thereon and the distribution of the proceeds thereof among its creditors; to compel all persons holding stock to pay in as a trust fund for such creditors all sums remaining unpaid thereon, and to fix and determine the amount which each of such stockholders must ultimately pay to discharge the claims of the creditors. The Oconto Water Company, and all parties holding or claiming to hold said stock, or any interest therein, and all persons claiming a lien upon its property, were made defendants, and were necessary parties to the suit.

(See authorities supra.)

The following named defendants appeared therein, to-wit: Oconto Water Company, S. D. Andrews, W. H. Whitcomb, George W. Sturtevant, Jr., S. W. Ford, Oconto National Bank, City of Oconto and Oconto City Water Supply Company. The Oconto Water Company was a necessary party to the suit and the decree, because its entire rights and property were affected, because it had an interest in the question of priority as well as the validity and extent of the liens or encumbrances sought to be enforced against its property, because it was interested in the question of the parties claimed to be its stockholders, and because it was interested in the question as to what unsecured creditors had valid claims against it.

Swan Land & Cattle Company vs. Frank, 148 U. S., 603.
Central R. R. Co. vs. Mills, 113 U. S., 249.
Thayer vs. Life Assn., 112 U. S., 717.

S. D. Andrews and W. H. Whitcomb were necessary parties because they claimed to have liens upon or an interest in the franchises and property of the Oconto Water Company and because they were alleged to be stockholders and indebted for a

balance due upon the stock held by them. George W. Sturtevant, Jr., was a necessary party because it was alleged that he claimed some interest in the stock, and was the president and one of the directors of the company. S. W. Ford was a necessary party because it was alleged that he claimed some interest in a portion of the stock and was one of the directors of the company.

"All the stockholders must be made parties."

Adler vs. Mil., &c., Co., 13 Wis., 57-63.

The Oconto National Bank was a necessary party because it held a portion of the bonds of the company which it was alleged had been issued without authority and were void. The City of Oconto was a necessary party because it had granted the Oconto Water Company an easement upon its streets and might be interested in the transfer or assignment of such easement. The Oconto City Water Supply Company was a necessary party because it claimed to have some interest in the franchises and property derived through Andrews and Whitcomb or the Oconto Water Company. Albert E. Smith was appointed receiver of the Oconto Water Company and of the rents, issues and profits of its plant, had operated it for two years, and by the decree was given a personal judgment against the Oconto City Water Supply Company. He was interested in the decree because he had such judgment and because he had not rendered his final account nor been discharged.

A joint appeal was taken from the decree by Andrews and Whitcomb and the Oconto City Water Supply Company and another appeal from a part of the decree by the City of Oconto. There was no application by either of these parties to sever in their appeals, nor was there any order of severance as to the other defendants.

No notice was served upon any of the defendants, Oconto Water Company, Charles C. Garland, F. H. Dodd, George W.

Sturtevant, Jr., S. W. Ford, Matt S. Wheeler, A. J. Elkins, N. S. Todd, Minneapolis Trust Company or Oconto National Bank, or upon the receiver, Albert E. Smith, to take an appeal or to take part in these appeals, or to appear in the Appellate Court, nor was there any refusal of any of said parties to appear or to proceed in such appeals, nor was there any appearance made by any of such defendants in the Court of Appeals. The prayer for and allowance of the appeal made by the defendants S. D. Andrews and W. H. Whitcomb and Oconto City Water Supply Company will be found at page 675 of the Transcript of Record, and the prayer for and allowance of the appeal by the City of Oconto will be found at page 680 of the Transcript of Record.

The citation upon the appeal of Andrews and Whitcomb and Oconto City Water Supply Company was addressed "To the National Foundry & Pipe Works, Limited, Richard Wood, Walter Wood, Stuart Wood and George Wood, Chapman Valve Manufacturing Company, Sherwood, Sutherland & Company, Dickinson Brothers & King and Cook & Hyde," and service of this citation was accepted by "Miller, Noyes & Miller, sols. for National F. & P. Wks. Ld., and Chapman V. Mfg. Co.," and the citation upon the appeal of the City of Oconto was addressed "To the National Foundry & Pipe Works, Limited, and Richard Wood, Walter Wood, Stuart Wood and George Wood," and service of this citation was accepted by "Miller, Noyes & Miller, solicitors for complainant, Van Dyke & Van Dyke, solicitors for Richard, Stuart, Walter and George Wood, intervenors." (Record, pp. 718, 719.) Counsel entered an appearance in the Court of Appeals "for the appellees National Foundry & Pipe Works, Limited, Chapman Valve Manufacturing Company, Sherwood, Sutherland & Company, Dickinson Brothers & King and Cook & Hyde." (Record, p. 723.) Counsel also entered an appearance for the appellants S. D. Andrews, W. H. Whitcomb and Oconto City Water Supply Company. (Record, pp. 723-724.) No other or different appearances were entered.

Because the defendant Oconto Water Company and such other defendants, and Albert E. Smith, receiver, did not appeal from the decree and were necessary parties thereto, either as appellants or appellees, no jurisdiction was conferred upon the Court of Appeals, and when the motion was made to dismiss the appeal, the court should have granted the motion, instead of proceeding to a hearing.

Masterson vs. Herndon, 10 Wall., 416.
Mason vs. U. S., 136 U. S., 581.
Hardee vs. Wilson, 146 U. S., 179.
Inglehart vs. Stansbury, 151 U. S., 68.
Davis vs. Trust Co., 152 U. S., 590.
Sipperly vs. Smith, 155 U. S., 86.
Beardsley vs. R. R. Co., 158 U. S., 123.

The question of want of jurisdiction need not have been raised by counsel nor by motion, but the Court of Appeals should have dismissed the appeal on its own motion for want of jurisdiction on any grounds.

Estis vs. Trabue, 128 U. S., 225.
Security Trust Co. vs. Sullivan (C. C. A., 7th Cir., Judge Woods), 77 Fed. Rep., 778-9.

The Circuit Court of Appeals for the Ninth Circuit has recently passed upon this question, dismissing appeals for want of jurisdiction in two cases substantially analogous to the case at bar. Thus arises a conflict of decisions on a most important question.

In *F. L. & T. Co. vs. Longworth*, 76 Fed., 609, it was held that an insolvent railroad company in the hands of a receiver appointed in foreclosure proceedings is a necessary party to an appeal from a decree giving to certain judgments against it priority over the mortgage. Judge Gilbert said:

"It is apparent that the Northern Pacific R. R. Company

was a necessary party to this appeal. It is true that the answer of the Farmers' Loan & Trust Company to the intervention of the petitioners alleges that the Northern Pacific Railroad Company is insolvent and that its property is inadequate to meet the mortgage liens; but this fact does not alter the rule nor dispose of the rights of the railroad company. The judgments have been established against the railroad company and it could not be heard to contest its liability upon the same; but it had a right to be heard upon the question of the payment of the judgments in preference to the payment of the mortgage liens. Concerning that controversy, it is one of the real parties in interest."

In *Illinois Trust & Savings Bank vs. Kilbourne*, 76 Fed., 883, it was held that where a decree gives priority to a certain claim against an insolvent corporation, the receiver thereof and all creditors whose claims are subordinated and who are parties to the suit are necessary parties to the appeal, and their absence is fatal to it. Judge Ross said:

"The receiver was clearly entitled to be heard upon the question as to whether there should be any change in the decree. So also were the holders of the second mortgage upon the property and the unsecured creditors."

In *Farmers' Loan & Trust Co. vs. McClure* (C. C.A. Eighth Circuit) 78 Fed., 211, it was held that on an appeal in an action for the foreclosure of a mortgage from a decree in favor of an attorney filing an intervention for his fees the mortgagor was a necessary party to the appeal on the ground that he "is interested in every order or decree in such a suit which gives the claim of an intervenor a priority over the mortgage or the right to priorty of payment out of the proceeds of the sale of the mortgaged property."

In *Dodson vs. Fletcher* (C. C. A. Eighth Circuit) 78 Fed., 214, it was held that in a proceeding instituted by a judgment creditor against an insolvent corporation for the appointment of a receiver, in which suit a mortgagee, a judgment creditor and a

mechanic's lien creditor filed intervening petitions respectively, and in which a decree had been entered in favor of the mechanic's lien creditor to the effect that he had a valid claim against the insolvent corporation which should be paid out of the assets of the company, but that his lien was not superior to that of the mortgagee, from which decree the mechanic's lien creditor appealed, causing a citation to be issued against the mortgagee alone, the defect of parties was cured by the railroad company, and the receiver who was appointed, entering a voluntary appearance in the Court of Appeals, but the appeal was dismissed because the judgment creditor was not served with the citation, and did not voluntarily appear in the Court of Appeals. Judge Sanborn said that such judgment creditor was "a necessary party to this appeal, and as it had no notice of the hearing, the appeal must be dismissed."

In *Gray vs. Havemeyer* (C. C. A. Eighth Circuit) 53 Fed., 174, it was held in a suit to foreclose a mortgage in which various creditors holding mechanics' liens intervened, that in an appeal from the decree establishing the priority of the respective liens of the mortgages and mechanics' liens against the property, the owners of the property and the various lienholders were necessary parties.

We call the attention of the Court to the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Mercantile Trust Co. vs. Railway Co.*, 58 Fed., 6, the opinion in which questions the soundness of the decision of this Court in *Hardee vs. Wilson*, *supra*, and lays down rules to some extent in conflict with the decisions of this Court as well as the two decisions above cited from the Court of Appeals for the Ninth Circuit.

We respectfully submit that we should be allowed to invoke the aid of this Court "to secure uniformity of decision" in the Circuit Courts of Appeals and the decision of this Court upon this important question of jurisdiction.

Lauowbew's Case, 141 U. S., 583.

In re Woods, 143 U. S., 206.
American Construction Co. vs. R. R. Co., 148 U. S., 383.

(2) The Court of Appeals had no jurisdiction because the appeal papers referred to several of the intervening creditors against whom the appeal was sought to be taken by the name of their firms, rather than by their individual names, and such defects were not remedied by any amendment in the Court of Appeals.

Estis vs. Trabue, 128 U. S., 225, and cases cited.

(3) The Court of Appeals had no jurisdiction because the decree was not a final one, entitling Andrews and Whitcomb to appeal therefrom.

The decree (Record, 671) contained the following provision:

"That said defendants S. D. Andrews and W. H. Whitcomb be and they are hereby ordered and required, and are hereby adjudged, to pay the amounts respectively adjudged due to the above mentioned unsecured creditors, to-wit, Chapman Valve Manufacturing Company; Sherwood, Sutherland & Company; Dickinson Brothers & King, and Cook & Hyde, together with their respective costs, as herein adjudged, and also that said defendants S. D. Andrews and W. H. Whitcomb be and they are hereby ordered and required to pay any deficiency that may be found due to said secured creditors, to-wit, the said National Foundry & Pipe Works, Limited, and the said R. D. Wood & Company, if any there shall be after applying to the satisfaction of their said respective mechanics' lien decrees hereinbefore referred to the proceeds of the sales made thereunder; the amount of such deficiency being made to appear to the satisfaction of this Court, and an order for such payment entered at the foot of this decree."

See R. S. Wis., § 3226.
3 Thompson Corp., § 3351.

It will be seen that the amount of the personal judgment, if any, against Andrews and Whitcomb depends upon the amount of the proceeds of the sale of the property under the mechanics' lien decrees. Until such sale is made and the deficiency ascertained to the satisfaction of the Court, no order can be made determining the individual liability of Andrews and Whitcomb. They may or may not be personally liable for any amount. In other words, judicial action is required by the Court in order to dispose of the ultimate rights of the parties to the litigation. The ascertainment of the amount of the deficiency and an order for its payment are not merely ministerial acts, but are judicial acts.

In addition to this the decree was not final because it did not settle the accounts of and discharge the receiver.

The rule as to what constitutes a final decree is thus stated by Mr. Justice Brown, in *McGourkey vs. Railway Co.*, 146 U. S., 536:

"It may be said in general that if the Court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court and for a judicial purpose, as to state an account between the parties upon which a further decree is to be entered, the decree is not final."

See Elder vs. McClaskey, 70 Fed. Rep., 529, rehearing, page 557.

Mr. Justice Brown in the recent case of *Union Mutual Life Insurance Co. vs. Kirkchoff*, 16 Supreme Court Rep., 318 (Jan. 6, 1896,) says that "the finality of decrees is a subject which has been so much discussed in the decisions of this Court that it is useless to do more than to cite the cases of *Lodge vs. Twell*, 135 U. S., 232, and *McGourkey vs. Railway Co.*, 146 U. S., 536, wherein most of the prior cases are reviewed."

In Lodge *vs.* Twell, *supra*, Chief Justice Fuller said: "What was left to be done was something more than the mere ministerial execution of the decree as entered. The decree was interlocutory, but not final, even though it settled the equities of the bill."

It may be that had the appellants Oconto City Water Supply Company and City of Oconto been permitted to take separate appeals from the decree as it affected their severable and distinct interests the Court would have jurisdiction thereof. It is clear, however, that the whole matter in controversy, so far as the appellants Andrews and Whitcomb are concerned, was not determined in the court below.

> *Hohorst vs. Packett Co.*, 148 U. S., 262, distinguishing *Hill vs. Railroad Co.*, 140 U. S., 52, and approving the case of *Montgomery vs. Anderson*, 21 How., 386, a case quite similar to the one at bar.
>
> See also *Nash vs. Harshman*, 149 U. S., 263.

(4) The appeal of the City of Oconto should have been dismissed for want of jurisdiction, as it was not taken from the whole decree. The appeal was only "from that part of said decree," "so far as the same allows the enforcement and execution of the lien decrees therein mentioned in the third paragraph." (Record, page 680.)

The third paragraph of said decree is as follows:

"That the said defendants S. D. Andrews and W. H. Whitcomb were privies to and concluded by the aforesaid mechanics' lien decrees of said complainant and of said R. D. Wood & Co." (Record, page 672.)

The act creating the United States Circuit Court of Appeals confers no authority upon that court to entertain an appeal from a *part* of a decree. The appeal must be from the *whole of a final decree*. "The case must not be sent up in fragments."

U. S. vs. Girault, 11 How., 22-32.

(5) The appeal should have been dismissed because the decree did not finally dispose of the case in respect to all parties on the record. There was no judgment of discontinuance or dismissal or by default as to, nor did the judgment dispose of the interest of, the following named parties, to-wit: George W. Sturtevant, Jr., S. W. Ford and Oconto National Bank, whose appearance was entered in the action, the defendants Charles C. Garland, F. H. Todd, Matt S. Wheeler, A. J. Elkins, N. S. Todd and Minneapolis Trust Company, who entered no appearance in the action.

The rule is settled "that final judgment cannot be properly entered against any of the parties until the whole case is disposed of; and that any neglect in the observance of the rule exposes the judgment to a reversal on error in the court below. According to the practice of this Court the judgment cannot be reversed on account of the error, but the case must be dismissed for want of jurisdiction and remanded to the court below to be proceeded in and finally disposed of."

U. S. vs. Girault, 11 How., 22-32, and cases cited.

See Hohorst vs. Hamburg-American Packing Co., 148 U. S., 262.

(6) The appeal should have been dismissed because all the issues involved in the case were not disposed of by the decree appealed from. The bill alleged that the Oconto National Bank claimed to hold or have in its possession the ordinance stock and bonds of the Oconto Water Company which had been assigned to it by Andrews and Whitcomb. (Record, page 13.) The bill alleged that the defendants Todd, Sturtevant and Ford were acting as directors of the corporation and that Sturtevant and Todd had or claimed to have some interest in or title to a portion of the stock. (Record, p. 8.)

The bill alleged that the defendants Wheeler, Elkins and N. S. Todd were the holders of three shares of stock in the corpor-

ation. (Record, page 8.) The bill alleged that the Oconto Water Company had executed a trust deed to the Minneapolis Trust Company as a first lien upon the franchises and property. (Record, page 13.) The bill alleged that Charles C. Garland subscribed for 990 shares of the capital stock and the defendant F. H. Todd for seven shares. (Record, page 6.)

The prayer of the bill asked "that the amounts of the subscriptions to the capital stock of the said Oconto Water Company still unpaid by the said defendant stockholders respectively be ascertained and determined, and that said defendant stockholders be adjudged to pay the amount or amounts so found to be due and owing from them and each of them to said corporation." (Record, page 16.)

The decree failed to dispose of these issues.

II.

The Court of Appeals Erred in Not Adhering to its Former Opinion and Enforcing the Mechanics' Lien Decrees.

(1) In *Oconto Water Company vs. National Foundry & Pipe Works, Limited, 18 U. S., 380,* the Court of Appeals in the mechanic's lien case said:

"As this Court concurs in the opinion and conclusions of the Circuit Court delivered by Circuit Judge Jenkins, that opinion is here published in full, and is as follows." (Page 389.)

On page 393 of such opinion it is said "the policy of the state (Wisconsin) accords with the highest equity." "Failing legislative exemption of any quasi-public corporation, I am not disposed to sanction a doctrine that leads to inequality and injustice." On page 406: "I follow these landmarks, guiding me, as I think, to a correct conclusion." It was there held that under the statutes of Wisconsin and the decisions of the Supreme Court of that state construing them, and the public policy prevailing in that state, the National Foundry & Pipe Works, Lim-

ited, and R. D. Wood & Company, had the right to mechanics' liens against the property of the Oconto Water Company, although a quasi-public corporation. These rights under such decision of the Court became vested, and no matter what might be the rights of other parties arising after a change in the decisions of the Supreme Court of the state, the law applicable to this complainant is thus stated in the leading case in this court of *Burgess vs. Seligman*, 107 U. S., 20, affirmed in the recent case of *Folsom vs. Ninety-six*, 159 U. S., 611, as follows:

"So *when contracts and transactions have been entered into* and *rights have accrued thereon under a particular state of the decisions*, or *when there has been no decision of the state tribunals*, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts *after such rights have accrued*." (Page 625.)

"As, however, the very object of giving to the national court jurisdiction to administer the laws of the states in *controversies between citizens of different states* was to institute *independent tribunals* which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise *independent judgment* in cases not foreclosed by previous adjudication."

The principle thus announced is this: That when contracts and transactions have been entered into and rights have accrued theron under a particular state of the decisions of a state court, the federal courts for the protection of a *citizen of another state having such vested rights* will adopt their own interpretation of the law applicable to his rights, and adhere to it, although a different interpretation may be adopted by the state courts *after* such rights have accrued, and although the federal court will, as to new rights arising after the decision of the state court, follow such later decision.

By examining the cases subsequent to *Burgess vs. Seligman*,

cited in the opinion of Judge Woods, it will be seen that there has been no departure from the rule adopted in that case.

In *Stutsman County vs. Wallace*, 142 U. S., 293, the parties were all citizens of North Dakota, the statutes of which the state court had construed, and the Court simply announced that it would follow the construction which the state court had put upon its own laws.

Bauserman vs. Blunt, 147 U. S., 647, was not a case where "contracts and transactions had been entered into or rights had accrued" to the parties under the decisons of the State of Kansas. In that case, too, it is said that the decision of the state court made after the decision of the federal court had been given "is supported by satisfactory reasons and is in accord with well-settled principles; and there is no previous adjudication of that court to the contrary." The Supreme Court, therefore, followed the decision of the state court on its merits and not because it felt bound to adhere to it in the absence of any vested rights. In the case at bar the Court of Appeals overruled its former decision wherein it gave an interpretation of the statutes of the state under which rights had accrued to the complainant by reason of the contracts and transactions which it had entered into under the laws of the State of Wisconsin, as the Court declared them then to be. Should these vested rights be disturbed and destroyed where the case does not arise after such rights had accrued, but in a case where the same party as before is asking their recognition and enforcement?

Loundes vs. Huntington, 153 U. S., 1, does not involve the question here presented.

Roberts vs. Lewis, 153 U. S., 367, was a case where the Circuit Court of Appeals had certified to the Supreme Court the question as to whether it should adhere to a decision of the Supreme Court construing a certain will, or follow a later decision of the Supreme Court of the state construing the will differently. That case arose *between different parties* and *concerning*

other lands than those involved in the prior decision of this Court. Consequently the Court was at liberty to follow the decision of the state court and to overrule its former opinion. But it did so in these words:

"And this Court, on reconsideration of the whole matter, with the aid of the various judicial opinions upon the subject and of the learned briefs of counsel, is of opinion that the sound construction of this will as to the extent of the power conferred on the widow, is in accordance with the conclusion of the state court, and not with the former decision of this Court, *which must therefore be overruled.*" (Page 377.)

We understand from the opinion filed by Judge Woods that the Court did not intend to and did not overrule its former decision, but held simply that a later case in the State Court, *in which this complainant whose rights were established in this property by that Court, was not a party,* "must be regarded as establishing a construction of the statute which the Federal Court would follow *without further inquiry.*"

We respectfully submit that the Court of Appeals within the doctrine of this Honorable Court, as laid down in the cases cited, was not bound to follow such later decison.

In *Balkan vs. Woodstock Iron Co.*, 154 U. S., 177, the doctrine simply was announced that the federal court would follow the construction which a state court had already put upon the provisions of the statute of the state.

In *Folsom vs. Ninety-six*,159 U. S., 611, this Court refused to be bound by the latest decision of the Supreme Court of South Carolina under the doctrine of the case of *Burgess vs. Seligman*, above cited. The conclusion rested upon the ground that the Court was unable to concur in the reasoning of the state court, but was "much better satisfied with the reasoning of the dissenting opinion," in that case, and furthermore, which without doubt was controlling, it appeared that the complainant "purchased the bonds relying upon their being legal and valid

obligations of the township; and that at the time of their issue and purchase these bonds and like bonds of other townships were regarded and treated as valid securities by the corporate authorities of the township, by the public, by the legal profession and by the legislative, executive and judicial departments of the state." That case recognized that the rights of the complainant had accrued, and had become vested under a different condition of the statutes and decisions of the state, and such rights the federal court would recognize and protect, notwithstanding the state court by a later decison had held to the contrary. Had complainant in that case purchased his bonds after the last decision of the state court, an entirely different question would have been presented. If in the case at bar the complainant's rights had accrued after the decision in the state court of the Chapman Valve case, a different question would be presented.

In *Forsythe vs. City of Hammond*, 18 C. C. A., 175, it was said by the Court of Appeals of the Seventh Circuit that "the decision of the state court, which we are asked to follow, seems to us to be in plain conflict with the weight and general current of authority on the subject. It is, too, not only not the logical result of the previous decisions of that court which may be deemed relevant to the question, but is, we think, distinctly inconsistent with them, and therefore ought not to be accepted as a declaration of the settled law of the state." We think this language is particularly apt in its application to the case at bar. The Court of Appeals, by adopting the opinion and reasoning of Circuit Judge Jenkins in the appeal in the mechanics' lien foreclosure suits in effect said that the doctrine of the Chapman Valve case was "not only not the logical result of the previous decisions of that court," but was "distinctly inconsistent with them, and therefore ought not to be accepted as a declaration of the settled law of the state." We most earnestly insist that the logic of the conclusions of Circuit Judge Jenkins in his opinion

adopted by the Court of Appeals is unanswerable, and we respectfully ask this Court, if necessary, to compare the same with the record of the Chapman Valve case in the state court. (89 Wis., 264.)

The Court of Appeals, as it was competent to do, wrote into the mechanic's lien statute of Wisconsin that a non-resident creditor of the Oconto Water Company had, under its contract with that company, the right to a mechanic's lien upon its property and upon its franchise as an incident thereto, good not only as against the debtor company, but any and all persons claiming under it, subject only to the question of priority of liens and of the right of redemption. The Chapman Valve case could no more affect that contract right than could "an amendment of the law by means of a legislative enactment."

Douglass vs. County of Pike, 101 U. S., p. 687.

See Evansville vs. Woodbury, 18 U. S. Ap., 7th Cir., 514-7.

How, then, could this same court impair the obligation of that contract and take away the vested rights of this creditor by following, and enforcing against the same creditor, a different construction of the statute first given by a subsequent decision of the state court in another case?

It does not seem any answer to this proposition to say that Andrews and Whitcomb were not parties defendant in the suits establishing the mechanics' lien decrees. If the complainant had vested rights in the property those rights were incontestable on and since the 15th day of September, 1890, the date of their accruing, against Andrews and Whitcomb, claiming under the Oconto Water Company, subject only to the right of Andrews and Whitcomb to redeem as subsequent encumbrancers.

We think the decison of the Court of Appeals of the Seventh Circuit in this case is in direct conflict with the recent decision of the Court of Appeals of the Sixth circuit in *Louisville Trust Company vs. Cincinnati,* 76 Fed., 296. This latter case Judge

Woods, in his opinion on rehearing, attempts to distinguish from the case at bar.

We submit that the case in the Sixth Circuit held the true rule and that such case did not involve "questions of contract" merely, but was one precisely like the case at bar, where contract rights were claimed to have become vested by reason of the interpretation given to a local statute.

The very ground upon which this Court has assumed the right to act as an "independent tribunal" in cases like this, is that contracts and transactions have been entered into and rights have accrued under the interpretations given to the local statutes by the federal courts, which interpreation will be adhered to by the federal courts, "although a different interpretation may be adopted by the state courts after such rights have accrued."

Burgess vs. Seligman, supra.

The mechanic's lien statute "was in existence when the mortgage of the appellants was made. *It entered into and became a part of their contract.*" (*Brooks vs. Ry. Co.*, 101 U. S., p. 451.)

We think, too, the decison of the Court of Appeals of the Seventh Circuit in this case is in direct conflict with the recent decision of the Court of Appeals for the Eighth Circuit.

In *Ryan vs. Staples*, 76 Fed., 721, Judge Thayer said:

"We admit the general proposition that when by a course of decision in the highest court of a state a rule has become established governing the descent, transfer or sale of property or affecting the title and possession thereof, a litigant in the federal courts cannot invoke the application of a different rule of law than that which has been thus established with reference to transactions that took place within such state. Bucher vs. R. R. Co., 125 U. S., 555–583; 8 Sup. Ct., 974, 978; Burgess vs. Seligman, 107 U. S., 20, 33; 2 Sup. Ct., 10, 21; St. John vs. Chew, 12 Wheat., 153, 168; McKeen vs. Delancy's Lessee, 5 Cranch., 32. But it would be a perversion of this wholesome doctrine to hold that a plaintiff suing in a federal court is not entitled to the independent judgment of that tribunal upon a question like the one now in hand, because of a single decision by the courts of the

state, which was not promulgated *until after the plaintiff's rights had attached and had become vested.*"

We think, therefore, in view of the uniform rule of this Court, as well as the want of uniformity between the decision of the Court of Appeals of the Seventh Circuit and the Courts of Appeals of the Sixth Circuit, the Eighth Circuit and other circuits, we should be permitted to invoke the aid of this Court to determine the law of this case.

(2) By examining the decison of Circuit Judge Jenkins, 52 Fed., 43, and the decision of the state court in the Chapman Valve case, it will be seen that they do not turn upon the construction to be given to the mechanic's lien statutes of Wisconsin, but rather upon general principles of law concerning which the federal courts are not bound to follow the state courts. Judge Jenkins held *first* that the defendant company had by its own acts "assented that upon its sale, voluntary or involuntary, the franchise to operate should pass" with the plant, and *secondly* that "equity should supplement and effectuate the law," and decree a sale of the franchise with the tangible property of the plant.

Judge Newman in the state court held *first* that the franchise "would not follow the plant on sale under a lien judgment" (contrary to this Court in *R. R. Co. vs. James*, 6 Wall., 750; *Howard vs. Ry. Co.*, 101 U. S., 837), and *secondly* that a court of equity has no "power to extend the lien over rights not made subject to it by the statute" (contrary to this Court in *Drawbridge Co. vs. Shepherd*, 21 How., 112; *Gue vs. Canal Co.*, 24 How., 257-64).

Because therefore the state court held a different view from the fedral court upon a general proposition of law and upon the question of the power possessed by a court of equity, the Court of Appeals was not precluded from the exercise of its independent judgment in adhering to its former decision instead of following "without inquiry" the "logic of the situation" as the state court pronounced it to be.

We cannot understand how a decree in equity of a federal court which orders a sale of the franchise of a corporation as a necessary incident to, and a part of, its tangible property, can be mutilated and nullified by the decision of a state court in another action which refuses to recognize the same equitable powers and principles in the state court, or how the same federal court is "bound to follow, without inquiry," the decision of the state court when the same complainant is asking enforcement of the rights already decreed him by such court. Such servitude is more than judicial comity. It is something more than subsequent encumbrancers of the premises should be permitted to ask. If their right to redeem, because not made parties to the mechanics' lien suits, is recognized, it is all they have the right to demand.

III.

The Court of Appeals Erred in Holding That the Mortgage of the Ordinance Rights Granted by the City of Oconto Carried With it the Entire Water Plant.

Authority was given by the legislature to cities in Wisconsin as follows: "The Common Council of every city and the Board of Trustees of every incorporated village in the State of Wisconsin are hereby authorized to permit, subject to such rules and regulations as they may prescribe, and such conditions as they may impose, the laying of pipes in the streets and alleys of their respective cities and villages, and the maintenance and use of such pipes, for the purpose of conveying water or steam, or either, under the surface of such streets and alleys." (Ch. 125, Laws 1879.)

The Oconto Water Company was organized under the general statutes of Wisconsin, "for the purpose of constructing and operating water works in the City of Oconto, Wisconsin, for supplying said city and its habitants with water, for protection

against fire and for domestic and other purposes. The said corporation shall have power and authority to acquire and hold, sell and convey, at its pleasure, any such estate, real, personal or mixed, as may be necessary or proper for the benefit or advantage of such corporation, and have, enjoy and possess all the powers and privileges necessarily incident to the business and purposes of said corporation." (See Articles of Organization, Record, p. 347.)

The general statutes under which the company was organized contain the following provision:

"Any corporation formed for the purpose of constructing and operating water works in any city or village in this state, may make and enter into any contract with such city or village to supply such city or village with water for fire and other purposes, upon such terms and conditions as may be agreed upon, and may, by the consent of and in the manner agreed upon with the proper authorities of such city or village, use any street, alley, lane, park or public grounds for laying water pipes therein; provided, no permanent injury shall be done to the same; and any such city or village may, by contract, duly executed by the proper authorities, acquire the right to use the water supplied by such corporation, or such portion thereof as it may desire, upon such terms and conditions as may be agreed upon by such corporation and the authorities of such city or village. Every such corporation heretofore organized shall continue to enjoy the rights given by the law under which it was formed."

Sec. 1780, R. S. Wis., as amended by Ch. 211, Laws 1879.

On July 9, 1890, the Common Council of the City of Oconto passed an ordinance whereby the Oconto Water Company, its successors or assigns, were authorized, subject to the limitations by law provided, "to construct, own, maintain and operate water works in the City of Oconto; to lay pipes for the carrying and distributing of water in any of the streets, avenues, alleys, lanes,

bridges or public grounds of the city as now or may be hereafter laid out, to acquire and hold, as by law authorized, any and all real estate, easements and water rights necessary to that end and purpose. . . .and for this purpose may enter upon any street, avenue, alley, lane, stream, bridge or public ground under the control of the city; to take up any pavement or sidewalk and make such excavations as may be necessary for the laying of such pipe and attachments." (Record, page 81.)

Subsequently the Oconto Water Company executed an instrument whereby it sold, assigned, transferred and set over to Andrews and Whitcomb "all the rights, privileges, immunities, franchises and powers of whatsoever name or nature which were granted unto the said Oconto Water Company in and by that certain ordinance passed by the Common Council of said City of Oconto and approved by the Mayor of said city on the 9th day of July, A. D. 1890, said ordinance being ordinance No. 153 of said city," as security for a sum not exceeding $40,000 to be advanced by Andrews and Whitcomb in accordance with the terms of a certain contract made by them with the Oconto Water Company. (Transcript of Record, page 80.)

The question which first arose and was determined in this action was the character of the right or property covered by such instrument. In Andrews vs. National Foundry & Pipe Works, Ltd., 52 Fed., Rep. 29, Judge Jenkins held that the instrument of transfer to Andrews and Whitcomb assigned "only such rights and privileges as were granted to the water company by the ordinance of the city. No other franchise or rights are attempted to be conveyed. If the right to the use of a street may be said to have proceeded from the municipality, it was standing alone, a mere easement. The transfer of such naked right could not carry with it the ownership of the mains nor the title to the plant as an entirety, nor the franchise to operate the plant, nor to the land upon which the plant was situated. So that if it be true as is here claimed, that a naked franchise is transmissible,

that the franchise is the main and the plant the incident, and that a transfer of the former carries with it the title to the tangible property essential to its use and beneficial enjoyment—it still remains that here there was no transfer of the franchise to operate the plant and consequently no transfer of tangible property."

It was held by Judge Jenkins "that the law of its incorporation confers upon the Oconto Water Company its franchise (1) to own and operate the water works; and (2) to use the streets of the city. * * * The law authorizes the city to assent to the exercise of a power granted by the statute. The grant of power to the water company—as to the use of the streets—becomes operative only upon the happening of that contingency of municipal assent. That is not a grant of power to a city to confer a franchise. * * * The franchise emanates from the legislature, not from the municipality. The ordinance is not an exercise of legislative power, but of the right to contract. * * * The power possessed by the City of Oconto was only to yield its assent to a legislative grant of the use of its streets and a contract for a supply of water."

On the other hand, Judge Woods, in the Court of Appeals, 61 Fed. Rep., 788, held that "by its act of incorporation the Oconto Water Company came into being, endowed not with the right to establish and operate water works in Oconto, but with capacity to receive and exercise that right or privilege upon such terms as the city should consent to grant. But, though capable of receiving, it could acquire no complete or effective right or franchise without the consent, and there is no impropriety, legal or verbal, in saying, without the grant of the city." "Whether or not and to what extent the mortgage of the franchises covers the plant of the company need not now be considered." (Page 789.)

Upon the rehearing the question whether the instrument called a mortgage covered the tangible property of the Oconto Water Company was left undecided, but it was said that the

mortgage was not a nullity and should be given some effect and that pending the litigation, the possession of the water plant should be retained by Andrews and Whitcomb. (62 Fed. Rep., 789-91.)

The City of Oconto was incorporated under Chapter 56, of the Laws of 1882, which contained the following provisions, giving authority to the Common Council by ordinance (1) "to prevent the encumbering of the streets, sidewalks, lanes and alleys with carriages, sleighs, buggies, lumber, firewood or other materials or substances whatever;" (2) "to lay out, make, open, keep in repair, alter or discontinue any alleys, streets, lanes or highways, and to keep them free from encumbrances and to protect them from injury;" (3) "to make and establish public pounds, pumps, wells, cisterns and reservoirs and to provide for the erection of water works for the supply of water to the inhabitants of the city."

In the opinion given in the mechanic's lien suit, 52 Fed. Rep., 43, Judge Jenkins held that "the right to the use of the plant should follow the tangible property devoted to such use and dependent upon it, and that the Oconto Water Company was deemed by its act of devoting the plant to public use under its franchise "to have assented that upon its sale, voluntary or involuntary, the franchise to operate should pass with it."

Accordingly the decree in the mechanic's lien case provided that the water works plant and the franchise of maintaining and operating the said plant for the uses to which it was devoted by the law of the defendant's incorporation as an entirety be sold at public auction. (Trans. of Record, p. 386.)

The opinion of Judge Jenkins was concurred in and the decree affirmed by the Court of Appeals. See 59 Fed. Rep., 19.

Upon the hearing in the Circuit Court of this case, Judge Jenkins, in his opinion, said, "I need not enter into discussion of the vexed question of what passed to Andrews and Whitcomb under these instruments, because the conclusions heretofore sug-

gested furnish the complainant and the intervening creditors an adequate remedy and render any decision of that subject unnecessary and perhaps unprofitable. I shall assume for the purposes of the decree that the instrument conveying the franchise also conveyed the plant."

68 Fed. Rep., 1013.

The opinion of Judge Woods in the Court of Appeals contains this statement:

"In respect to the title of Andrews and Whitcomb we are of the opinion that, under the circumstances, the mortgage of the franchise carried with it the water plant. That the mortgage was valid this Court declared when the case was here upon the first appeal. * * * The franchise as described in the ordinance referred to in the mortgage included the right to construct, own, maintain and operate the particular water plant which was in contemplation and already in process of construction when the mortgage was executed. In the opinion in Chapman Valve Manufacturing Company vs. Oconto Water Company, 89 Wis., 264, 273 (60 N. W., 1004, 1005), it is said 'nor does the franchise follow the plant by force of the rule that the incident follows the principal. If that maxim has any application it should be considered that the franchise is the principal thing. All other rights spring from the franchise."

76 Fed Rep., p. 176.

In the opinion of Judge Woods, on petition for rehearing, the following statement is made: "Our opinion upon the point, it is to be observed, does not state, nor imply, the broad proposition that the mortgage of a franchise will include tangible property as an incident. The statement is simply that in this instance the mortgage of the franchise carried with it the water plant because the franchise, as described in the ordinance referred to in the mortgage, expressly included the right 'to construct, own, maintain and operate' the particular plant which was

in contemplation and already in process of construction when the mortgage was executed.

This involves no inconsistency with the proposition that the transfer of tangible property held and used under a franchise, without which it could not be of use or value, carries the franchise.

Monongahela Nav. Co. vs. U. S., 148 U. S., 312, 13 Sup. Ct., 622.

The reasonable view, and, as we suppose, the equitable rule, is that, when two things are so connected as to be inseparable without destruction, a transfer of either will be deemed to have been intended to carry the other. There is no inherent necessity for holding such a transfer void and it would be an inadequate system of equity which could require or permit that conclusion. But in this case the intention to include the plant with the franchise is evident, and there is no necessity for entering upon the vain inquiry whether one or the other is the "principal thing."

77 Fed. Rep., p. 776.

This rule, we think, is inconsistent with the rule announced by the state court in 89 Wis., 264, and seemingly approved by Judge Woods (76 Fed., p. 176), but is consistent with the opinion of Judge Jenkins adopted by the Court of Appeals in the mechanic's lien suit, where the Court held that the sale of the tangible property would and should also carry with it the franchise of operating it.

The Transcript of Record shows that the so-called mortgage of Andrews & Whitcomb was given within one or two days after the commencement of the work upon the water plant and at that time the Oconto Water Company did not own the real estate upon which the well was dug and the plant constructed, which was owned by the city, but had a verbal understanding that the city would sell to the company the land upon which the plant was to be located, upon the payment of a certain price therefor.

This money was paid by the receiver and a deed of the property was executed by the city to the Oconto Water Company on the 31st day of January, 1894.

(See Transcript of Record, pp. 669-670.)

The question to be argued in this court is therefore whether the instrument given to Andrews & Whitcomb included and carried with it the franchises of the company and the water plant subsequently erected and the tangible propetry subsequently acquired by the company. Our contention will be that the instrument covered only such rights as were given to the Oconto Water Company by the City of Oconto, and that such right consisted merely in an *easement* to use the streets of the City of Oconto and was not a franchise of the corporation derived either directly or indirectly from the state. It was precisely what Judge Jenkins held it to be in his opinion in the 52 Fed. Rep., approved by Circuit Judge Taft in *Detroit vs. Ry. Co.*, 56 Fed. Rep., 867-880, and what Judge Woods defined such a right to be in a later case, *Citizens' Street Ry. Co. vs. City Ry. Co.* (Cir. Ct. Ap., 64 Fed. Rep., 647.)

In this later case, speaking of the analogous case of an ordinance to a Street Ry.Co., Judge Woods said: "The consent of the Common Council being required, it is in a sense true that the franchise is granted by the city, since the ultimate right is acquired or becomes effective only upon the giving of that consent. Andrews *vs.* Pipe Wks. (7th Cir.), 10 C. C. A., 60; 61 Fed. Rep., 782. The power to construct tracks, switches, sidetracks or turn-outs upon the streets, and by implication, the right to run cars thereon, is conferred by the statute, or in other words, is derived directly from the state, *so that, strictly speaking, the city does not grant the franchise, but simply consents to its exercise. Detroit Citizens St. Ry. Co. vs. City of Detroit* (C. C. A. 6th Cir.), decided Oct. 2nd, '94 (64 Fed., 628)," (p. 649).

In the last named case, thus approved by Judge Woods, and

which has become a leading one, it was held that the consent required by the municipality to the use of its streets means "no more and no less than would be meant by 'right-of-way' or 'easement.' 'Consent' in the connection used is synonymous with 'easement' or 'right-of-way.'"

(64 Fed., pp. 645-6.)

In *Africa vs. Knoxville*, 70 Fed. Rep., 729, numerous authorities are cited in the opinion of Judge Clark to the same effect and the following quotation from a Pennsylvania case is cited as laying down the correct principle: "The municipal consent of itself can confer no right. The municipality has no power to confer the franchise, but it is the franchise, and that alone, which gives the legal right to build the railway. When the franchise is granted, authority is conferred to lay the track and it can then truly be said that the laying of a track is authorized. Municipal consent is only essential to the *execution* of the authority, not at all to its *creation*." (Page 734.)

See *Louisville Trust Co. vs. Cinn.*, 76 Fed., 296.

Is it not, then, a novel and dangerous principle of law which Judge Woods announced in this case that the "consent" or "easement" or "right of way" which the City of Oconto gave to this water company was under the statutes of Wisconsin a franchise "to construct, own, maintain and operate" its plant in Oconto and that a transfer or mortgage of such "consent," "easement" or "right-of-way" necessarily, and without words expressly or impliedly requiring it, carried with it all the other franchises and all the future acquired tangible property of the corporation?

To sustain this view it became necessary to put a construction upon the instrument called a mortgage of which we contend its language does not admit.

Judge Woods, in speaking of this in his opinion in 61 Fed. Rep., said, "But not by the words alone should a writing be in-

terpreted. 'The rule is to regard the intention rather than the words.'" (Page 786.)

This we respectfully submit is not the canon of construction of written instruments; but rather the following rule laid down by Denman, C. J., in *Rickman vs. Carstairs*, 5 B. & Ad., 651-63, as follows: "The question in this and other cases of construction of written instruments, is not what was the intention of the parties, but what is the meaning of the words they have used."

See *Johnson vs. Ins. Co.*, 39 Wis., p. 87.
Bank vs. Wilkin (Wis.), 69 N. W. Rep., 354.

So Judge Woods under the rule announced by him interpolated the words "in terms" into the written instrument and thereby construed it to mean not as a mortgage simply upon the rights "which were granted unto the said Oconto Water Co. in and by that certain ordinance," etc., but upon all the franchises "which *in terms* were" so granted. This seems more than a forced construction. It is making a new contract for the parties.

But when that opinion was given the record of the case before Judge Woods did not contain the complaint of Andrews and Whitcomb, filed in proceedings to foreclose such mortgage and which is now found in Transcript of Record, pages 545-79. In such complaint it was alleged that the Oconto Water Co. "was the owner of a certain franchise theretofore duly granted it by the City of Oconto" (page 55), and that upon the execution of such instrument of mortgage, "the said defendant delivered to and the plaintiffs received and have ever since retained the same as constructive delivery of such franchise, a copy of the ordinance granting to the defendant the franchise above mentioned, * * such delivery and receipt of said copy of ordinance * * being made pursuance to and in virtue of the provisions of said instrument." (Page 563-4.)

These allegations, it seems to us, clearly demonstrate that the intention of the parties was, as the instrument clearly stated,

that an assignment should be made of only such rights as had been granted in the ordinance of the city.

Notwithstanding what appears in the present record, Judge Woods, in his opinion on rehearing, 77 Fed. Rep., at page 776, seems to fall into the same error of construction when he says that "the franchise as described in the ordinance referred to in the mortgage expressly included the right to 'construct, own, maintain and operate' the particular plant which was in contemplation and already in process of construction when the mortgage was executed," and *"the intention to include the plant with the franchise is evident."*

The construction of this instrument of mortgage becomes therefore all important in the view taken by the last expression of opinion on this subject.

That the view taken by Judge Jenkins and embodied in the mechanics' lien decrees that in this case whatever right or franchise was covered by the instrument called a mortgage was incorporated into and became an incident to the tangible property of the water plant, and would pass by a sale thereof instead of the so-called franchise or easement being the principal and the tangible property the incident, is, we shall contend, sustained by the following decisions of this Court:

Monongahela Nav. Co. vs. U. S., 148 U. S., 312.
R. R. vs. Delamore, 114 U. S., 501.
R. R. vs. Commissioners, 112 U. S., 609.

It will be observed that the so-called mortgage contained no provision stipulating for future acquired property. In the absence of such a provision the mortgage would not cover such property. Express words or an unmistakable intention must appear from the face of the mortgage.

Maxwell vs. Mfg. Co., 77 Fed. Rep., 938.

Judge Woods, in *Grape Creek Coal Co. vs. Farmers' Loan Co.*, 24 U. S. App., 38–48, laid down the correct rule as follows:

"The theory upon which courts of equity extend the lien of a mortgage to after acquired property is that the mortgage, though inoperative as a conveyance, is operative as an executory agreement which attaches to the property when acquired."

See Bear L. & R. W. & I. Co. vs. Garland, 164 U. S., 1.

To hold that a transfer or mortgage of an ordinance or of the privileges given by a city to such a company carries with it the title to or an encumbrance upon the title to every piece of real estate or personal property which such company subsequently purchases or owns for the carrying on of its business, no matter where such property is located, would be an anomalous principle in the law and would tend to the subversion of all doctrines respecting the title to and transfer of real and personal estate.

Hence it is earnestly suggested that the question of the character and transfer of such a franchise is one of grave and general importance and merits the consideration and authoritative decision of this Court.

IV.

The Court of Appeals Erred in Holding That the First Mortgage Bonds Delivered to Andrews and Whitcomb Should Not be Declared Void.

These bonds were issued contrary to the provisions of Section 1753, R. S. Wis. (hereinafter printed at length), and were therefore properly ordered cancelled.

N. F. & P. Works, Ld., vs. Oconto Water Co., 52 Fed., 29
Pfister vs. Mil. Elec. Co., 83 Wis., 86.
Galloway vs. Hamilton, 68 Wis., 651.

The creditors had a right to have them cancelled as a cloud upon the title to the property of the Oconto Water Company, and creditors would not be bound by the equities which barred the complainants from relief in the case of *Hinckley vs. Pfister*,

83 Wis., 64, or the case of *Mass. Ben. Life Assn. vs. Lohmiller*, 74 Fed. 23, cited in the opinion of Judge Woods.

V.

The Court of Appeals Erred in Holding that Andrews and Whitcomb were Not Bound by the Mechanics' Lien Decrees.

(1) At and before the date of the rendition of such decrees, Andrews and Whitcomb were stockholders, and the only stockholders of the Oconto Water Company. They were, therefore, privies to the corporation as stockholders therein, and bound by all proceedings against the corporation affecting its property. If the corporation could not dispute the fact that a valid lien existed on its property, its stockholders could not, although they also held a lien upon its property which originated after the complaintants' lien had accrued. Their right of redemption under their mortgage might not be cut off, but their right to impeach the complainants' lien would not be greater than that of the corporation.

Graham vs. R. R. Co., 118 U. S., 161, affirming 14 Fed. Rep., 753.
R. R. vs. Howard, 7 Wall., 392.
Sanger vs. Upton, 91 U. S., 56.
Hawkins vs. Glenn, 131 U. S., 319.
Glenn vs. Liggett, 135 U. S., 533–42.
Bridge Co. vs. Provision Co., 46 Fed. Rep., 584.
Bennett vs. Glenn, 55 Fed. Rep., 956 (5 C. C. A., 353).
Burgess vs. Seligman, 107 U. S., p. 26.
Gaskill vs. Dudley, 6 Met., 546 (39 Am. Dec., 750).
2 Black on Judgments, Sec. 583.
2 Beach on Corp., Sec. 726.
Bank vs. Chandler, 19 Wis., 434.
Chaffin vs. St. Louis, 4 Del., 24.
Glenn vs. Williams, 60 Md., 93–116.

(2) On the 24th day of February, 1894, Andrews and Whitcomb filed a petition in this suit, in which they set out the proceedings taken by the complainant for the foreclosure of its lien against the property of the Oconto Water Company, the entry of the decree therein and its subsequent affirmance by the United States Circuit Court of Appeals; that all the property covered by the decree was in the possession of the receiver, and, among other things, stating as follows:

"Your petitioners hereby make all of the records, files and proceedings in said cause (mechanic's lien suit) a part of this their petition, and beg leave at all times to refer thereto the same as though they were set forth at large herein."

Petitioners asked for an injunction restraining the marshal from proceeding with a sale under such decree in the mechanic's lien foreclosure suit, or from in any manner interfering with the property or franchises in the possession of the receiver. Upon this petition an order to show cause was obtained by them why an injunction should not be issued as prayed for in the petition, and subsequently, upon hearing the petition, an order was made granting the relief prayed. This application to the Court for relief was, in effect, an intervening petition in the mechanic's for relief was, in effect, an intervening petition in the mechanic's lien suit. Andrews & Whitcomb having invoked the aid of the Court, based upon the proceedings in that suit, and obtaining affirmative relief thereby, are concluded by the decree in that action, and cannot now claim that such decree is of no validity or effect as against them. They occupy the same position as though they had intervened in form in the foreclosure proceedings.

2 Black on Judgments, Sec. 550.

(3) It appears from the answer of the defendants Andrews and Whitcomb that they became bidders at the public sale, under the foreclosure of the alleged mortgage to them by the

Oconto Water Company, and bid in the property on the 11th day of September, 1891, and by virtue of such purchase and conveyance to them, which was confirmed by the Court, they took possession and claimed to be the owners of all the property of the Oconto Water Company. By virtue of the decree in their foreclosure suit, they were authorized to bid at the sale, and if their bid should be accepted, it was provided that they should have credit thereon to the extent of the full amount adjudged to be due them by the defendant.

This decree, as between them and the Oconto Water Company, had the effect of merging all claims and liens under their first and second mortgages, and the sale to them had the effect of discharging any lien or claim which they may have had under their judgment. Ingraham *vs.* Champion, 84 Wis., 235-9. Such purchase by them had substantially the same effect as though they had acquired by direct purchase from the Oconto Water Company all its rights and property; subject, however, to the prior claim which the complainant had against the same property. It appears from the answer that notice was given Andrews and Whitcomb at the sale of the rights and claims of the complainant in and to the property. Besides, the petition for mechanic's lien was on file and the suit to foreclose the same was pending. Having thus become a purchaser of the property *pendente lite* with knowledge, both constructive and actual, of the proceedings to foreclose the mechanics' liens, they are bound by the decrees subsequently rendered in such proceedings. They came within the general rule that a purchaser of property, who buys pending litigation concerning it, comes into privity with his vendor so as to be bound by the judgment in that suit, the same as if made a party of record.

"The law is that he who intermeddles with property in litigation, does so at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset."

2 Black on Judgments, Sec. 550.
Collins vs. Smith, 57 Wis., 284.
Jesup vs. Bank of Racine, 15 Wis., 668.

The complainant's lien antedated that of Andrews and Whitcomb. The suit of the complainant to foreclose its lien was begun prior to the foreclosure suit of Andrews and Whitcomb. The two suits involved the same subject-matter, and were commenced against the same defendant from whom both lien claimants derived title.

The suit last begun went to judgment first and the plaintiffs became purchasers of the property at the sale under the judgment. By thus purchasing, their judgment, in which their mortgage lien had become merged, was wholly satisfied.

Ingraham vs. Champion, 84 Wis., 235-9.
McDonald vs. Magirl (Iowa), 66 N. W. R., 904.

They succeeded to all the rights of the Oconto Water Company in the property purchased, but did not thereby cut off or affect the prior lien and rights of the complainant in the property.

When, therefore, at a later date the decree was entered in the prior action to enforce a prior lien, the rights of Andrews and Whitcomb were those of purchasers *pendente lite*. They took title subject to the judgment in the action of complainant which was first begun, and became "bound by such judgment to the same extent as the parties to the action."

Smith vs. Ford, 48 Wis., 115, a case quite in point.

(4) The defense in both the mechanic's lien foreclosure proceedings was conducted substantially by and in the interest of Andrews and Whitcomb. The counsel of the two defendant parties has been the same. (See Affidavit of W. H. Webster, Record, p. 147-150.) The records and proceedings in evidence show that whatever has been done in the defense of the pro-

ceedings instituted by the complainant to foreclose its lien has been for the interest of Andrews and Whitcomb. They have substantially assumed the defense in the foreclosure proceedings, and they are as much bound thereby as though they had been parties thereto.

2 Black on Judgments, Sec. 540.
Daskam vs. Ullman, 74 Wis., 474.
Robbins vs. Chicago, 4 Wall., 657.

(5) Andrews and Whitcomb were in privity with the mortgagor, the defendant Oconto Water Company, in any event as to the instruments dated March 13, 1891, and May 16, 1891, they having received their title or rights under such instruments subsequent to the filing of the petition for mechanic's lien on Jan. 28, 1891, and the commencement of the proceedings to foreclose the same on the 3d day of February, 1891.

Keokuk R. R. Co. vs. Missouri, 152 U. S., 301–314, and cases cited.

They are likewise in privity with the mortgagor as to the instrument dated September 15, 1890, inasmuch as their rights under such instrument were obtained with notice of the prior and paramount lien of the complainant for materials necessary to construct the water plant, and they are bound by the decree establishing such right as paramount to their mortgage.

Vilas vs. McDonough Mfg. Co., 91 Wis., 607.
Bear Lake, &c., Co. vs. Garland, 164 U. S., 1.

While Andrews and Whitcomb might not be deprived of the right to redeem from the prior incumbrance of the mechanics' liens, as they were not made parties defendant to the mechanics' lien suits, yet they took their mortgage from the Oconto Water Co. burdened with the liens of these material men. "The grantor can transfer no greater rights than he himself has, and hence the title which he conveys must necessarily be subject in

the hands of the grantee to all the burdens which rested upon it at the time of the transfer."

Campbell vs. Hall, 16 N. Y., 575–9.

Andrews and Whitcomb are therefore estopped to deny the *existence* and *extent* of the prior mechanics' liens on the property.

VI.

The Court of Appeals Erred in Not Holding Andrews and Whitcomb, or any Other Stockholder, Liable to the Creditors.

The following statutes of Wisconsin cover the question of stockholders' liability to creditors in corporations organized under the laws of the state.

R. S., Section 1751. The capital stock of every corporation, divided into shares, shall be deemed personal property, and when certificates thereof are issued, such shares may be transferred by indorsement of the owner, his attorney or legal representatives and delivery of the certificates; but such transfer shall not be valid, except between the parties thereto, until the same shall have been so entered on the books of the corporation, as to show the names of the parties by and to whom transferred, the number and designation of the shares, and the date of the transfer; and every person transferring any such certificates or shares of stock shall remain liable to the creditors of the corporation to the extent and in the manner prescribed in section seventeen hundred and fifty-six; and every such corporation shall at all times have a lien upon all shares of stock for all debts due from the owner thereof to such corporation.

R. S., Section 1752. Whenever it shall be made to appear to the Circuit Court, by affidavit or otherwise, that the secretary or other proper officer of any corporation has, upon proper demand, neglected or refused for two days to transfer on the stock books of the said corporation any stock which it is his duty to transfer, such court shall immediately issue an order requiring said secretary to show cause before said Court, at some time named in said order, not more than ten days from the date thereof, why he should not transfer such stock, and shall in said

order direct the manner of its service; and when said order is returnable, unless said secretary shows cause to the satisfaction of the Court why such stock should not be transferred, said Court shall order such transfer to be made by said secretary, at such time and place as to said Court shall seem reasonable, and may enforce the performance thereof by proceedings for contempt.

R. S., Section 1753. No corporation shall issue any stock or certificate of stock, except in consideration of money, or labor, or property estimated at its true money value, actually received by it, equal to the par value thereof, nor any bonds or other evidence of indebtedness, except for money, labor or property, estimated at its true money value, actually received by it, equal to seventy-five per cent. of the par value thereof, and all stocks and bonds issued contrary to the provisions of this section, and all stock dividends or other fictitious increase of the capital stock of any corporation, shall be void; provided, however, that any corporation whose stock or bonds have been or shall hereafter be admitted to the stock exchange of Chicago, New York, Boston or Philadelphia, or either of said cities, may sell such stock or bonds so admitted at the best price or prices current for the time being obtainable therefor on any of the said exchanges at which the same shall be offered for sale.

R. S., Section 1756. If any stock shall be transferred which is not fully paid, the corporation may, by agreement, to be noted on its stock book, discharge the stockholder making such transfer, from liability to it for the unpaid part of his stock subscription and accept that of the person to whom the stock is transferred in his place; but the person transferring such stock shall be liable for the amount unpaid thereon to the then creditors of such corporation, and those who may become such within six months after such transfer, or to any lawfully appointed receiver or assignee of the corporation for their use.

The revisers' note to this section is as follows:

"Sec. 14, ch. 144, 1872, amended so as to provide that a transfer of stock shall not release the transferrer from his liability for then existing debts. The six-months' provision has been in practice an inadequate protection against transfers to escape liability, and nothing short of continued liability ever will be sufficient to that end. It is a creditor's right, who is not a party to these transfers, generally secret; and inasmuch as there is no double liability of stockholders, provisions to secure honesty in discharge of stock debts ought to be stringent. The provision

that the transferee shall be primarily liable is omitted, because it would probably require the remedy against him to be exhausted before proceeding against the transferrer, and without it there remains an option to sue either, as may be desirable."

R. S., Section 1757. The books of every corporation containing the stock subscriptions and accounts shall at all reasonable times be open to the inspection of the stockholders; and every creditor of a corporation shall be informed at any time of the amount of capital stock of such corporation subscribed, the amount paid in, who the stockholders are, the number of shares of stock owned by each, and the amount unpaid by each stockholder upon the shares owned by him, and if any shares of stock, which were not fully paid for, have been transferred within six months of the time of inquiry, the name of the person who transferred the same and the amount due thereon at the date of such transfer. And the officers of such corporation shall furnish any such creditor correct information thereof. And any officer refusing, when requested so to do, shall be liable for any damage caused thereby.

R. S. Section 1758. In actions by or for the benefit of any such creditor *against stockholders to recover what may be due and unpaid on any stock, such stockholders* shall only be credited with such sums as have been actually paid in, in money, or its equivalent in value, on account of such stock, and not with any dividend which may have been declared and applied on such stock.

R. S., Section 1759. Every corporation shall keep a correct and complete record of all its proceedings, including such as relate to the election of its officers; and such record may be kept in any other than the English language, when so provided in its articles of organization. Every corporation shall also keep a book containing the names of all stockholders or members, since its organization, showing the place of residence, amount of stock held, time of acquiring stock or becoming a member, time of transfer of stock or cessation of membership, of each respectively. If any officer, agent or servant of any corporation, shall omit to make any entry in the books or records thereof, which it is his duty to make as such officer, agent or servant, he shall forfeit not less than twenty-five nor more than one thousand dollars, and be liable for all damages thereby sustained.

R. S., Section 1760. Every stockholder of any corporation shall be entitled to one vote for each share of stock, held and owned by him, at every meeting of the stockholders and at every election of the officers thereof, and may vote either in person or

by proxy at such elections, and by proxy at other meetings when so provided by the by-laws of the corporation; and every executor, administrator, guardian or trustee shall represent the shares of stock in his hands at all meetings of the stockholders, and may vote thereat as a stockholder.

R. S., Section 1827. (Relating only to railroad corporations.) No person holding stock in any such corporation, as executor, administrator, guardian or trustee, and no person holding such stock as collateral security shall be personally subject to any liability as stockholders of such corporation, for any calls or installments on any past (part) paid stock thereof; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of such executor, administrator, guardian or trustee, shall be liable in like manner, and to the same extent, as the testator or intestate, ward or person interested would have been if he had been living, or competent to act, and held the same stock in his own name.

The following statutes of Wisconsin cover proceedings by creditors against insolvent corporations:

R. S. Section 3216. Whenever a judgment shall be obtained against any corporation incorporated under the laws of this state and an execution issued thereon shall have been returned unsatisfied in whole or in part, upon the petition of or by an action commenced by the person obtaining such judgment or his representatives, the Circuit Court within the proper county may sequestrate the stock, property, things in action and effects of such corporation and may appoint a receiver of the same.

R. S., Section 3217. In the final order in any such action, the Court shall direct a just and fair distribution of the property of such corporation and of the proceeds thereof to be made among the fair and honest creditors of such corporation, in proportion to their debts respectively, who shall be paid in the same order as provided in Section three thousand two hundred and forty-five.

R. S., Section 3223. Whenever any creditor of any corporation shall seek to charge the directors, trustees or other officers or stockholders thereof, on account of any liability created by law, he may commence and maintain an action for that purpose in the Circuit Court, and may at his election join the corporation in such action.

R. S., Section 3224. The Court shall proceed therein, as in other cases, and when necessary shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers, who shall possess all the powers conferred and be subject to all the obligations imposed on receivers by the provisions of Section three thousand two hundred and nineteen; but if, upon the filing of the answer or upon the taking of such account, it shall appear that the corporation is insolvent, and that it has no property or effects to satisfy such creditor, the Court may proceed without appointing any receiver to ascertain the respective liabilities of such directors, trustees or other officers and stockholders, and enforce the same by its judgment as in other cases.

R. S., Section 3225. Upon a final judgment being rendered in any action to restrain a corporation or against the directors, trustees, officers or stockholders, the Court shall cause just and fair distribution of the property of such corporation and of the proceeds thereof to be made among its creditors, in the order prescribed in Section three thousand two hundred and forty-five.

R. S., Section 3226. In all cases in which the directors or other officers of a corporation or the stockholders thereof, shall have been made parties to an action in which judgment shall be rendered if the property of such corporation shall be insufficient to discharge its debts, the Court shall proceed to compel *each stockholder to pay in the amount due and remaining unpaid on the shares of stock held* by him, or so much thereof as shall be necessary to satisfy the debts of the corporation. If the debts of the corporation, or any part thereof, shall still remain unsatisfied, the Court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and adjudge the amount payable by each, and enforce the judgment as in other cases.

R. S., Section 3227. Whenever any action shall be commenced against any corporation, its directors, trustees or other officers or its stockholders, according to the provisions of this chapter, the Court may, by injunction, on the application of either party and at any stage of the proceedings, restrain all proceedings by any other creditor against the defendant in such action; and whenever it shall appear necessary or proper, may order notice to be published in such manner as the Court shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of

such order, and in default thereof to be precluded from all benefit of the judgment which shall be made in such action and from any distribution which shall be made under such judgment.

R. S., Section 3228. In every such action, the Court may compel such corporation to discover any stock, property, things in action or effects, alleged to belong or to have belonged to it, the transfer and disposition thereof and the consideration and all the circumstances of such disposition. Every officer, agent or stockholder of such corporation, and every person to whom it shall be alleged that any transfer of property or effects of such corporation has been made, or in whose possession or control the same is alleged to be, may be compelled, in the discretion of the Court, to testify in relation thereto, and to answer any questions touching the transfer or possession of such property or effects, although such answer may expose the corporation of which he is a member, to a forfeiture of its corporate rights or any of them, or such witness to a prosecution for a criminal fraud; but such answers shall not be used as evidence upon any information, indictment or other criminal prosecution or proceeding against him.

R. S., Section 3245. If in any such action it shall be adjudged that a corporation has forfeited its corporate rights, privileges and franchises, judgment shall be rendered that such corporation be excluded from such corporate rights, privileges and franchises and be dissolved; and thereupon the affairs of such corporation shall be wound up by and under the direction of a receiver, to be appointed by the Court, and its property sold and converted into money; and the proceeds, after paying the costs and expenses, shall be distributed in the following order:

1. For the payment of taxes and debts due the United States, the State of Wisconsin, and any county, city, town or village therein.

2. For the payment of the legal and equitable liens upon the property of such corporation, in the order of their priority.

3. For the payment of the other just debts of the corporation.

4. The residue of such moneys, if any, shall be distributed among the stockholders thereof.

When any corporation shall be adjudged to have exercised a franchise or privilege not conferred on it by law, the Court may, in its discretion, instead of rendering a judgment as above provided in this section, render a judgment that such corporation be excluded from exercising such franchise or privilege and

that the plaintiff recover costs, and may also in either case in its discretion fine such corporation in a sum not exceeding two thousand dollars, to be collected and paid into the state treasury.

STATUTE CONSTRUCTION BY STATE COURT.

In *Application of Murphy*, 51 Wis., 519, it was held that every transfer of stock not entered on the books of the corporation as provided for in Section 1751, is "absolutely void" as to creditors.

In *Herdegen vs. Cotzhausen*, 70 Wis., 589, the Court held that stock only partly paid for was entitled to be transferred on the books of the company, the transferee becoming liable for the unpaid subscription. The Court enforced this right, notwithstanding Section 1753, R. S. of Wisconsin, which provides that all certificates of stock shall be void when issued for stock not fully paid. Such section was construed as meaning that the *stock certificates* would be void, but that the beneficial ownership in the stock itself was capable of transfer on the books, the corporation, under Section 1751, preserving its lien upon the stock for the debts due from the owner thereof to the corporation, including any amount unpaid thereon.

In *Williamson vs. State*, 74 Wis., 263, it was held that all persons purchasing stock certificates, or dealing with them in any manner, are chargeable with notice of the provisions of the statute, including Section 1751, preserving a lien upon stock for all debts due it, including balance unpaid upon the stock.

In *Gogebic Investment Co. vs. Iron Chief Min. Co.*, 78 Wis., 427, it was held that the issue of stock that has not been paid for is not only a violation of the statute, but "a fraud upon the creditors of the corporation," and that as between the stockholders and creditors it is sufficient to establish the liability of the former to show simply that they are holders of unpaid stock.

It is significant that all these statutes speak of the "stockholder," the holder of stock, not the stock "owner" or "subscriber."

The articles of incorporation of the Oconto Water Company fixed the stock of the company at $100,000 and provided that "each *stockholder* shall be entitled to one vote for each share of stock owned by him or her and duly entered by name on the *stock certificate book* of said corporation." (Record, pp. 547-8.)

The articles, furthermore, make it the duty of the secretary to "keep a book for recording all transfers of stock" (Record, page 548), and that "any *bona fide holder of the stock* of this corporation shall be a member thereof. Certificates of stock shall be transferred by endorsement, but are *only valid as between the parties* to such transfer until the same shall have been so entered on the books of the corporation, as to show the names of the parties and to whom transferred, the number and designation of the share or shares, and the date of the transfer." (Record, page 549.)

It appears by the evidence that there was but one stock book kept by the company, which consisted of the stock certificate book, in which all entries were made relating to all the issues of stock and its transfer. The record book of the company shows that with the exception of three shares all the stock was subscribed by C. C. Garland, except seven shares by F. H. Todd.

It thus appears that the Oconto Water Company had a book, filling the requirements of the statute as a stock book, in which was entered the issue by the company of the entire stock, with the exception of three shares, to Garland and Todd, and the transfer of the same to Andrews and Whitcomb in compliance with Section 1751, of the Revised Statutes; that Andrews and Whitcomb have since such transfer remained the holders of record of the stock thus transferred to them. On December 20, 1890, upon their demand and under their direction, the secretary of the corporation entered in such stock book a statement that Garland and Todd were the *owners* of the stock, while they held it as pledgees.

This stock book shows no transfer at any time of this stock

to Sturtevant or any one else. Any attempted transfer by Andrews and Whitcomb of this stock, or any interest in it, was not "entered on the books of the corporation" in the manner required by the statutes, and was therefore a nullity as to the creditors of the Oconto Water Company.

The question, therefore, resolves itself into this: Who are the "stockholders" mentioned in Section 1758 of the Revised Statutes, Wisconsin, against whom creditors are entitled to recover what may be unpaid upon their stock in proceedings under Section 3226, R. S.?

The answer of the defendants Andrews and Whitcomb contains allegations admitting the following facts concerning the issue and ownership of the capital stock of the Oconto Water Company.

On *or before July 15th*, 1890, subscription was duly made to the *entire capital stock* of the company, by *Garland 990 shares*, Todd 7 shares, Barnes 1 share, McCabe 1 share and Krippene 1 share. (Record, p. 24.)

Neither Barnes, McCabe nor Krippene had any interest in the stock, but their connection with the company was solely for the benefit of Garland. (Record, p. 27.)

Upon obtaining the stock certificate book on October 1, 1890, Garland and Todd, "in order to make and keep a record in said book of the *names* and number of shares of the respective *stockholders* of said company—no other stock record of any kind being or ever having been kept by said company except the original stock subscription list hereinbefore referred to—in form," filled out 1 certificate to Barnes, 1 to McCabe, 1 to Krippene, 7 shares to Todd and 990 shares to Garland, "the same being respectively the *number of shares subscribed* for as hereinbefore stated by each of said above-named persons." (Record, p. 32.)

Garland and Todd filled out the assignments endorsed on their respective certificates "so that these *defendants appeared* from the back of each of said certificates Nos. 4, 5 and 6 to be

the *owners* thereof as the *assignees of said Garland* of said certificates Nos. 4 and 6, and as the assignees of said Todd of said certificate No. 5, all of which was done by the said Garland and Todd for *the purpose of putting in pledge* the said 997 shares of the capital stock of said company to these defendants as security, pursuant to the terms and conditions of said contract," being the contract of September 13th. (Record, p. 34.)

On October 2d, Garland enclosed the three certificates in a letter to Andrews and Whitcomb at Norway, Maine. (Record, p. 34.)

On October 7th, Whitcomb, for Andrews and Whitcomb, returned all the certificates in a letter to Garland, saying that "the stock should be issued to us direct, for the reason that the company's books now show this stock to be yours and not ours, and should trouble arise, could be *attached and held as your property*. Our object in having you and Mr. Todd hold a small amount of the stock was to keep the organization all right. Mr. Andrews will be on the ground *to represent* this stock at *any meeting* you may hold, or he can give proxy. I think you will comprehend the situation without further explanation." (Record, p. 35.)

Garland received the certificates, marked them for cancellation with date of surrender October 18, 1890, and on that day he and Todd filled out new certificates, all to Andrews and Whitcomb, signed and sealed the same officially, and made the proper notations in the stubs of each, "showing said certificates to have been issued to these defendants on the 18th day of October, 1890, and enclosed the same in a letter to Andrews and Whitcomb of that date." (Record, p. 36.)

No entry was made on the stock certificate book showing that Andrews and Whitcomb held these certificates as pledges until December, 1890, when the secretary of the company (*under direction of Whitcomb*) wrote across the face of the stub of three of the certificates as follows: "This stock is *owned* by Chas. C. Garland and issued to Andrews and Whitcomb mere-

ly as collateral. F. H. Todd, Secretary;" and on the stub of the other certificate as follows: "90 shares of this stock *owned* by C. C. Garland, and 7 shares owned by F. H. Todd and issued to Andrews and Whitcomb merely as collateral. F. H. Todd, Secretary." (Record, pp. 36-37.)

On the 22d day of October, 1890, Andrews and Whitcomb signed a receipt "that we, Andrews and Whitcomb, of Norway, Maine, do hereby acknowledge the receipt this day from *C. C. Garland*, of Minneapolis, Minnesota, of four certificates issued to us and representing 990 shares of the capital stock of the Oconto Water Company, etc." (Record, p. 38.)

The records of the Oconto Water Company copied into the answer show that at a stockholders' meeting held October 29, 1890, Garland signed as *owner* of 990 shares, Todd as owner of 7 shares and Wheeler, Elkins and Todd each as the owner of 1 share. (Record, pp. 38, 39, 42, 44, 52, 53.)

The resolutions adopted at such stockholders' meetings recite, among other things, that "the officers of this company on or about the 3d day of October, 1890, cause to be *issued to said Garland* the *990* shares of the capital stock of this company by him theretofore *subscribed for*" (Record, p. 40), and that "*Garland, in pursuance of the contract between him and Andrews and Whitcomb signed over to Andrews and Whitcomb, at their request, the 990 shares of the capital stock theretofore issued to him.*" (Record, p. 41.)

The board of directors on the same day passed the same resolutions with the same recitals as to the issue of the stock to Garland and the *assignment thereof by him to Andrews and Whitcomb.* (Record, pp. 47, 48.)

Andrews and Whitcomb had knowledge of these proceedings of the directors and stockholders on Jan. 12, 1891, at which time the record book of the Oconto Water Company, showing proceedings of the stockholders and directors at their several meetings up to that date, was given to them. (Record, pp. 54, 56.)

At this time they knew that the complainant had not been paid for the pipe which had been delivered to and used by the Oconto Water Company. (Record, pp. 55, 56.)

At a meeting of Garland, Todd, Andrews and Whitcomb and Sturtevant, on or about Jan. 12, 1891, Andrews and Whitcomb gave notice that they would put no further money into the plant unless Garland should cease his connection therewith, whereupon he "consented to resign as president and as a director of said company, and *assign all his interest in the stock subscribed by him* as aforesaid, and give up all rights and interest claimed by him under any contracts with the said company, in *consideration whereof* these defendants . . . agreed to and did release the said Garland from all liability as an endorser of the notes given by the Oconto Water Company to these defendants for the $40,000 loaned said company by these defendants as hereinbefore stated, whereupon these defendants and the said Garland mutually agreed that the said defendant George W. Sturtevant, Jr., was a proper and fit person in view of his skill and experience and administrative ability in such affairs to receive the *transfer and assignment of all of the said Garland's interest in said company, its stock* and property." And thereupon Garland executed an assignment reciting that "C. C. Garland, of Minneapolis, Minnesota, *being the true owner of* the following certificates of stock of the Oconto Water Company, a corporation of Wisconsin, viz.: Certificate No, 7, for 300, certificate No. 8, for 300, certificate No. 9, for 300, and certificate No. 10, for 97 shares, seven of the latter, however, being the property of F. H. Todd, all, however, being now pledged to and held by Andrews and Whitcomb, of Norway, Maine, as collateral security, do hereby for value received sell, assign and set over unto George W. Sturtevant, Jr., of Bushnell, Illinois, all of my *right, title and interest in* and *to* all of said *certificates* of *stock,* and do hereby constitute and appoint the said George W. Sturtevant, Jr., my true and lawful attorney irrevocably for me and in my name and stead but to his use, to make and ex-

ecute all necessary acts of assignment and transfer of said stocks on the books of said company." (Record, pp. 57, 58.)

"These defendants *admit* that neither the defendant *Sturtevant* or the defendant Ford ever paid to the said defendant Oconto Water Company any consideration for the stock certificates so as aforesaid assigned to them respectively, and that neither of these *defendants* paid said Oconto Water Company *any new consideration* for the two shares of stock as above set forth, assigned to them respectively by the said defendant Wheeler and N. S. Todd." (Record, p. 59.)

The answer alleges, that "on the 12th day of January, 1891, a stockholders' meeting of said company was held at the office of said company in said City of Oconto, pursuant to the written consent of *all the stockholders* of said company under said assignment of stock as aforesaid made, and assigned in the said record book of said company." (Record, p. 60.)

The record book shows that a consent was signed by all the stockholders to the holding of the meeting, signed by Sturtevant 990 shares, Todd 7 shares, Ford 1 share, Wheeler 1 share, Andrews 1 share, and that at such meeting directors were elected. (Record, pp. 60–61.)

Mr. Andrews acted as secretary of this stockholders' meeting. (Record, p. 62.)

The record book also shows another meeting of all the stockholders of the Oconto Water Company, held March 9, 1891, at which the stock was signed as last above stated. (Record, p. 67.)

The answer also sets up that a suit was commenced by Andrews and Whitcomb on June 17, 1891, in the Circuit Court of Oconto County against the Oconto Water Company, and that in pursuance of a decree of the Court a sale was made of the *$100,000 of capital stock* of the company pledged to Andrews and Whitcomb, and that upon such sale Andrews and Whitcomb *purchased said stock* and procured from the referee a *bill of sale thereof.* (Record, pp. 71, 73, 103.)

It is expressly stated in the answer that upon receiving such bill of sale "the defendants then being in *the actual possession of the entire capital stock of said company*," took actual possession of the company's water works system, and have ever since retained actual possession of said property, claiming to own the same under said referee's sale thereof to them." (Record, p. 73.)

Such are the admissions in the answer of the appellants.

The agreement referred to in the answer as Exhibit F, made between Garland and the Oconto Water Company, dated September 17, 1890, and entered on the record book of the company, provides that *990 shares* of the capital stock of the company *subscribed for by Garland should be issued to him* in lieu of $99,000 in cash, being a part payment to Garland in consideration of his agreement to furnish material and construct the water plant in accordance with the terms of such agreement, and also provided that *he (Garland) should substantially carry out* and perform the promises made by the company in the agreement of September 13th with Andrews and Whitcomb. (Record, pp. 92-3-4-5.)

The release, signed by Andrews and Whitcomb to Garland, dated Jan. 12, 1891, provides that they will hold him harmless from any loss by reason of his endorsement of any of the promissory notes held by them, or by the Norway National Bank of Norway, "whether said liability accrues against said Garland personally *or as a former stockholder* in said company, to-wit, Oconto Water Company." (Record, p. 264.)

Sturtevant testified that he thought he *owned 990* shares of stock which were *first issued to Garland and transferred by Garland* to him in January, 1891. (Record, p. 372.)

That he never paid any money for such stock (Record, p. 373), or delivered any property therefor (Record, 374), and could not state what was paid (Record, pp. 373-4); never made any claim for services (Record, pp. 374-5); took the stock at the

request of Andrews and Whitcomb, and held it for their benefit. (Record, pp. 376, 427.)

Garland testified on examination by appellant's counsel that it was his understanding that as between him and the company, the company becoming owner of the franchise through his efforts the *990 shares of stock for which he subscribed and which were subsequently issued to him, were considered paid for.* (Record, p. 275.)

Mr. Webster, counsel of appellants, stated that at the time Sturtevant took the stock, it was *assigned to him by Garland, who only held the legal title*, while it was pledged to Andrews and Whitcomb, and Garland assigned to Sturtevant all the interest he had in the stock *which was a mere equity*, subject to Andrews and Whitcomb's liens upon it by virtue of the contracts between Andrews and Whitcomb and the Oconto Water Company. (Record, p. 378.)

Sturtevant further testified that *Garland was the owner of the stock*, if the loans of Andrews and Whitcomb were paid, and he understood that was the condition of the stock when it was transferred to him. (Record, p. 379.)

Andrews testified, when his deposition was taken in October, 1891, that Andrews and Whitcomb *then claimed to own all the shares of stock, amounting to $100,000*, in the Oconto Water Company. (Record, p. 217.)

Whitcomb testified that he understood that Andrews and Whitcomb became *owners of the $100,000 of the capital stock* of the Oconto Water Company by virtue of the sale made to them in September, 1891. (Record, p. 492.)

Andrews further stated under oath that the property purchased by them at the sale in September, 1891, was subsequently transferred to the Oconto City Water Supply Company, which was stocked for $125,000, *all of which stock*, except $5,000, was *owned by Andrews and Whitcomb.* (Record, p. 332.)

The certificates of stock issued by the company do not recite that the shares are full paid, or are non-assessable, but merely

certify that the parties to whom they are issued are entitled to a certain number of shares of the capital stock, transferable only on the books of the company on surrender of the certificate. (Record, pp. 519 to 543.) The stock was transferred from Garland to Andrews and Whitcomb in the ordinary way under Sec. 1751, R. S. Wis.

It appears from the evidence that Andrews and Whitcomb from January, 1891, took the management of the company and thereafter controlled its policy and operations by virtue of the possession and control of all of its stock.

Although at all times Andrews and Whitcomb were liable as stockholders to the creditors of the company, they occupied somewhat different relations at different times as between themselves and the company or Garland.

1. From October 2d to October 18th, they were transferees from Garland, by endorsement, of certificates Nos. 4, 5 and 6.

2. From October 18th to December 20th, they appear by the stock book of the company owners and holders of record of certificates Nos. 7, 8, 9 and 10.

3. From December 20th to January 15th, 1891, they appear by the stock book of the company as holding the certificates aforesaid as collateral security, Garland being the owner.

4. From January 15th, 1891, to September 12th, 1891, they still remained, so far as the stock book of the company was concerned, the same; although in fact, by assignment by Garland of his interest in the stock to Sturtevant, upon a consideration furnished by Andrews and Whitcomb, they became the real and beneficial owners of the whole stock, Sturtevant merely acting nominally for them.

5. From September 12th, 1891, down to the time of the commencement of this suit, they remained stockholders of record as before, kept possession of the stock, and claimed to be the owners of the same absolutely, *but at no time had they paid for the stock issued to them.*

6. At no time after Oct. 2, 1890, did the company have or claim any ownership of or right or interest in any of the stock. The stock was issued by it absolutely not in escrow or in pledge.

The fact that Andrews and Whitcomb appear as stockholders on the books of the company, although they may in fact have held the stock only as collateral security, renders them liable to creditors for the amounts unpaid thereon.

Sleeper vs. Goodwin, 67 Wis., 592.
Williamson vs. State, 74 Wis., 263.
Pullman vs. Upton, 96 U. S., 328.
Bank vs. Case, 99 U. S., 631.
Welles vs. Larrabee, 36 Fed. Rep., 871.
1 Cook on Stock, etc., Sec. 247.
Hawkins vs. Glenn, 131 U. S., 319.
Wheelock vs. Kost, 77 Ill., 296.
Coleman vs. Howe, 154 Ill., 458.
Scovill vs. Thayer, 105 U. S., 143.
Lewis vs. Switz, 74 Fed., 381.

It is immaterial, therefore, whether the stock book of the corporation shows this stock to have been held by Andrews and Whitcomb as absolute owners all of the time or part of the time as pledgees, in the absence of any statute relieving them from liability in case they held the stock as collateral security. The fact that the legislature expressly provided by Section 1827, R. S., that no person holding stock in a *railroad* corporation as collateral security should be personally liable for unpaid subscriptions, emphasizes the decisions of the courts that in the absence of such a statute in respect to stockholders in other corporations the liability remains the same, whether held absolutely or conditionally.

1 Cook on Stockholders, Sec. 247.

In *Pullman vs. Upton*, 96 U. S., 328, Justice Strong says:

"It makes no difference that the legal owner—that is, the one in whose name the stock stands on the books of the corporation—is in fact only, as between himself and his debtor, a holder for security of the debt, or even that he has no beneficial interest therein, and he cites approvingly the case of *re* Phoenix Life Ins. Co., Hoares Case, 2 Johnson & H., 229, in which certain parties were registered as shareholders and the word "trustees" added in the margin of the register, but they were held as shareholders to the full extent as though the shares stood absolutely in their name.

See *Grew vs. Breed*, 10 Met., 569.

The transfer to Sturtevant was in the interest of, and for a consideration by, Andrews and Whitcomb; and they therefore became liable as stockholders in fact.

Bank vs. Case, 99 U. S., 628.
Bowden vs. Johnson, 107 U. S., 251.
Welles vs. Larrabee, 36 Fed. Rep., 869.
1 Cook on Stock., etc., Secs. 253, 265 and 421.
Flash vs. Conn., 109 U. S., 371.
Bank vs. O. Mills, 23 At. Rep., 795.

Sturtevant was the "dummy" of Andrews and Whitcomb.

A stockholder cannot escape liability by the use of the name of a "dummy."

Aultman's Appeal, 98 Pa. St., 505.
Roman vs. Fry, 5 J. J. Marsh, 634.
Stuart vs. Hayden, 72 Fed. Rep., 402.

It has been the settled law in Wisconsin from a very early day, that, independently of any statutory provision, an action may be maintained in equity on behalf of creditors to compel the payment of the balance remaining unpaid upon the capital stock of a corporation, "on the ground that the capital stock, being a

trust fund, may be followed by the creditors and others having an interest in the proper application of it into the hands of third persons having notice of the trust attaching to it; and that stockholders, whether delinquent or withdrawing, are always, both in law and fact, affected with such notice."

Adler vs. Manufacturing Company, 13 Wis., 57.
See *Gogebic Ins. Co. vs. Iron C. M. Co.*, 78 Wis., 427.

The principle has been firmly established in this court that "the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation."

Sawyer vs. Hoge, 17 Wall., 610.
Pollard vs. Bailey, 20 Wall., 520.
Sanger vs. Upton, 91 U. S., 57.
Mills vs. Scott, 99 U. S., 25.
Terry vs. Little, 101 U. S., 216.
Co. of Morgan vs. Allen, 103 U. S., 498.
Scovill vs. Thayer, 105 U. S., 143.
Richardson vs. Green, 133 U. S., 30.
Clark vs. Bever, 139 U. S., 96.
Ogilvie vs. Insurance Co., 22 How., 380.
Camden vs. Stuart, 144 U. S., 113.

The case of *Burgess vs. Seligman*, 107 U. S., 20, is relied upon as governing this case. It is clearly unlike and distinguishable from this. Justice Bradley stated the nature of that action as follows:

"This is an action brought by the plaintiff Burgess against J. and W. Seligman & Co., as stockholders of the Memphis, Carthage and North-Western R. R. Co., *under a statute* of the State of Missouri, to recover a debt due to him by the company."

The action was one *at law*, brought under the provisions of the statute of Missouri to recover in the right of the corporation a debt due to the plaintiff from the defendant, alleged to be a

stockholder. The whole discussion there was whether the defendant, to whom the corporation had pledged its stock as collateral, was within the exemption of the statute of Missouri which expressly provided that no person holding stock as collateral security should be personally subject to any liability as a stockholder of the company. Under the contract existing in that case, it was shown and held by the Court that the stock *belonged to the company and to it alone*, and that the Seligmans were mere trustees or custodians of it for a special purpose. (See page 30.)

In the case at bar it is beyond dispute that under the evidence this stock was understood to be, as it was in fact, issued by the corporation to Garland and Todd, and thereafter transferred to Andrews and Whitcomb; the Oconto Water Company having parted with and having lost entire control of such stock.

The case of *Burgess vs. Seligman*, therefore, differs from the case at bar in the following respects:

First. That was an action at law, while this is a suit in equity.

Second. That action was based upon a statutory provision authorizing any creditor to sue the stockholders of a corporation where the corporation itself left debts unpaid. This is a proceeding in equity on behalf of all creditors to subject the unpaid amounts of the capital stock of the corporation as a trust fund to the payment of their debts.

Third. In that case the statute of Missouri expressly exempted from liability any person who appeared on the books as a stockholder where such stock was held by him as collateral security. In this case there is no exemption under the statutes of Wisconsin in favor of a stockholder other than in a railroad company, who holds the stock as collateral security, but, on the other hand, under the decisions of the Supreme Court of the state, such stockholder is equally liable as one holding the stock absolutely.

Fourth. In that case the corporation continued to own the stock as between itself and the defendants who were mere custodians of it, and therefore had "no claim whatever against them in relation to the stock, except to have it returned when properly required after the purpose of its issue had been accomplished."

In this case the corporation had parted with its stock beyond recall, but by contract had imposed upon Garland, to whom it had issued the stock, the obligation of pledging it to Andrews and Whitcomb as collateral security. That the stock in this case was issued by the company within the meaning of the statutes of Wisconsin is clear from the decision in *Pfister vs. Electric R'y Co.*, 83 Wis., 86, where it was held with reference to the issue of corporate bonds as security for loans that "when a corporation puts its bonds beyond its control by hypothecating them as security for loans, or for any other purpose, or in any other manner, it *issues* them within the meaning and intention of the statute."

It appears from the report of the Pfister case that the point was made by counsel, that the bonds were never "issued;" one of the authorities cited to such proposition being the case of Burgess *vs.* Seligman.

Fifth. In that case, as in others cited by appellant's counsel, the evidence was clear that the parties, sought to be held liable as stockholders or shareholders, held the stock merely as collateral security, without title to the same and without exercising directly or indirectly by means thereof any control over its operations, while in this case the appellants held and claimed from the beginning secret liens and claims upon all the franchises and property of the company, and within a short time had not only the entire management of the company, but the absolute title to all the stock.

Sixth. Under the statutes of Wisconsin the stock books are conclusive evidence as to who are stockholders and how the

transfer of stock must be made upon the books of the company so far as creditors are concerned, and in this case Andrews and Whitcomb are estopped to deny that they obtained the stock as transferees from Garland and Todd, and that they thereby became liable as stockholders to creditors.

The distinction between this case and the case of Burgess *vs.* Seligman is further pointed out in the opinion of his Honor Judge Jenkins, to which we respectfully beg leave to refer.

The Stock Book is Conclusive Evidence.

That the stock book is *conclusive* evidence as to who are the stockholders liable to creditors is sustained by all the authorities. In *Stanley vs. Stanley,* 26 Maine, 191, in which it appeared that the statutes of Maine in regard to the issuing and transferring of stock were substantially similar to the statutes of Wisconsin, the Court says: "There should be some settled and well-defined mode in which creditors should readily be able to ascertain who were stockholders at the time of their giving credit in such cases. They could not be expected to know anything of the private negotiations between stockholders and other persons, unless some such mode were prescribed. The transfer books would furnish such data as, if they are allowed to be conclusive, would answer the purpose; and it seems scarcely reasonable to doubt that the legislature must have intended such evidence should be relied upon conclusively." "The legislature must, of course, have considered that reliance upon information so obtained (and it could only be obtained by the clerk from the transfer books) was conclusive in favor of the creditors, as against the stockholders of the corporation." "The transfer books, so far as creditors were concerned, were to be deemed conclusive as to who were to be considered as stockholders."

The case of *Harpold vs. Stobart,* 46 O. St., 397, is a leading one, and thus states the principle contended for, to which we

find no exception, and no case in conflict under statutes similar to those in Wisconsin.

The doctrine is thus stated: "The creditors have the right to resort to and rely upon the proper book of the company as showing who the stockholders are, and the amount of stock held by each, and they are presumed to have relied upon the record so found in this case. While it is not necessary that a book of any special kind be adopted for that purpose, yet when one is selected and used, that becomes the stock book, and transfers, to be valid, must be made upon that. The object to be accomplished by the keeping of such a book requires reasonable certainty as to its identity. Where the book so selected and used by the company shows that the party is the owner of shares of stock, he is estopped, as between himself and creditors, to contradict the record, provided the entry was placed in the stock book originally by his consent. And where the name of an actual stockholder appears upon that book as owning a given number of shares, the entry is presumed to have been made with his consent; at least this is so where it was correct when made, and, as between him and creditors of the corporation, he is estopped to contradict the record, or deny ownership of the shares."

In *Richmond vs. Irons*, 121 U. S., 27, the same doctrine was held in a case against a stockholder in a national bank, who had transferred his stock and had ceased to be a stockholder in fact, so as to be liable to creditors, except for the fact that his stock had not been transferred on the books of the bank, as provided by Section 5139 of the Revised Statutes. The Court say that "by Section 5139 of the Revised Statutes those persons only have the rights and liabilities of stockholders who appear to be such as are registered upon the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer. Until such transfer the former holder is the stockholder for all the purposes of the law."

So in *Hawkins vs. Glenn*, 131 U. S., 319, it was held that "stockholders of record are liable for unpaid installments, although they may have in fact parted with their stock or may have held it for others."

"So far as creditors were concerned, Hawkins remained a shareholder as to the two hundred shares." (Page 335.)

See *National Bank vs. Watsontown Bank*, 105 U. S., 222.

In *Matthews vs. Albert*, 24 Md., 527, a case referred to in Burgess *vs.* Seligman, the statute of Maryland expressly provided that no person holding such stock as collateral security should be personally subject to any liability as stockholder of such company (page 528), and it appeared in that case that a certificate of stock, absolute on its face, was issued to the defendant Tiernan, but which certificate Tiernan caused an endorsement to be made on declaring that said certificate had been deposited with Tiernan as collateral security for the payment of the loan of $2,000 made by said Tiernan—the certificate to be returned on payment of the loan. (Pages 533-4.) The loan was made by Tiernan to the company and the company delivered the stock certificate to Tiernan as collateral security for its payment. The Court held that under the provision above cited Tiernan was not subject to any liability as stockholder.

So in *Burgess vs. Seligman*, 107 U. S., 20, the statute of Missouri expressly provided that "no person holding such stock as collateral security shall be personally subject to any liability as a stockholder of such company," and it appeared there that the names of the defendants were entered in the stock transfer book, as required by law, as holding the shares of stock as collateral security, the exact words being "held in escrow," which the Court construed as indicating "that the stock was not to be regarded as their stock, but as belonging to the company, though in their names, and that it was held by them simply as security." (Page 28.)

The Court held in that case that the doctrine of estoppel arising from being represented and voting at stockholders' meetings did not apply to the defendant, because "creditors could not complain, for, on the hypothesis that stock may lawfully be held at all in trust or as collateral security, without incurring liability to them, the act of voting on the stock cannot injure or affect them. *In the absence of such a law the case might be very different.* (Page 28.)

ANDREWS AND WHITCOMB ARE ESTOPPED TO DENY LIABILITY AS STOCKHOLDERS.

When Andrews and Whitcomb, holding the stock in their own names on the stock book of the company, caused an entry to be made by the secretary of the company in such book that Garland and Todd were the owners of the stock, and they held it as pledgees, they thereby estopped themselves as against creditors from claiming the fact to be otherwise. They cannot now be heard to claim, as was done in the Burgess *vs.* Seligman case, that they received their stock directly from the company, which still remained the owner, and that they held it from the company merely as collateral security.

"It is not an element of this estoppel that any or all the creditors of the corporation should have been deceived actually by the appearance of the vendor's name on the books. All creditors are supposed to contract with reference to the state of the books, whatever it may be."

Lowell on Transfer of Stocks, Secs. 191, 82 and 85.

"Where the book so selected and used by the company shows that a party is the owner of shares of stock, he is estopped as between himself and creditors to contradict the record, provided the entry was placed in the stock book originally by his consent."

Harpold vs. Stobart, 46 O. St., 400–101.

In *Keyser vs. Hitz*, 133 U. S., 138, it was held that the mere transfer of stock on the books of the corporation to a person without his knowledge or consent, does not of itself impose upon the transferee the liability of shareholder, but if, after the transfer, the transferee approves or acquiesces in it, or in any way ratifies it, he becomes liable to be treated as a shareholder, with all the responsibility which the law imposes in such a case, and this liability is the same whether new certificates have or have not been issued to the transferee after the transfer. In that case it appeared that the defendant, Mrs. Hitz, received certain dividends upon stock which had been transferred on the books in her name without her knowledge or consent. The Court say:

"Whether she received the dividends or not depended upon the inquiry as to whether the checks for them were endorsed by her. If she endorsed them or either of them, she is estopped to say that she did not know their contents and was not the owner of the shares of stock upon which the dividend was declared." (Page 149.)

"*Nothing is better settled in the law of corporations than that the stockholder whose name appears on the books of the corporation with his own consent is absolutely bound in the character which he thus assumes, both to the company and to its creditors.*"

3 *Thompson on Corp.*, Sec. 2937, page 2101.

See *Lewis vs. Switz*, (Neb.), 74 Fed., 381.

The Court cannot consider the contract of September 13, 1890, in determining the relation of Andrews and Whitcomb to the Oconto Water Company or its creditors in the issue and holding of the stock. *Harpold vs. Stobart, supra.* This contract was not known to the creditors and they had no right to demand an inspection of it. The statutes of the state, however, gave them the right at all times to information as to the stock book and, whether they sought the information or not, to what-

ever remedies such stock book would disclose against Andrews and Whitcomb at any time.

There is nothing inconsistent with this doctrine in the cases cited in the opinion of Judge Woods, but such cases all recognize it.

In *Anderson vs. Warehouse Company*, 111 U. S., 479, the party sought to be held liable as a stockholder because holding stock as a pledgee did not appear upon the stock book of the corporation as a stockholder. The Court say:

"The Warehouse Company never was the owner of the stock in question, and never held itself out as such." (Page 483.)

"Those who examined the list of shareholders would have found the name of McClosky or of Ferris as the registered holder of 450 shares. There was nothing on the books of the bank to connect them, or either of them, with the Warehouse Company, and therefore, no credit could have been given on account of the apparent liability of the company as a shareholder." (Page 434.)

"The Warehouse Company promptly declined to allow itself to stand as a registered shareholder because it was unwilling to incur the liability such a registry would impose."

"The security of the Warehouse Company was perfected without imposing on the company a shareholder's liability." (Page 485.)

See *Rickerson R. M. Co. vs. Farrell F. & M. Co.* (*C. C. A., Mich.*), 75 Fed. R., 554.

In *Handley vs. Stutz*, 139 U. S., 417, the effect of registry on the stock book is not considered. In that case, however, the defendants, who received stock after an increase of the same had been voted, without paying for the same, were held liable both to existing and future creditors under the doctrine of *Sawyer vs. Hoag*, 17 Wall., 619, and subsequent cases. The only exception in the case to liability was against those who subscribed for the bonds of the company and received an amount

of stock equal to the bonds as an additional inducement to their subscription. The Court, as to these, held that an acting corporation, finding its original capital impaired by losses, for the purpose of recuperating itself and of producing new conditions for the successful transaction of its business, might increase and issue new bonds and new stock and put them upon the market and sell them for the best price that could be obtained, and that in such case no trust would arise in favor of a creditor against the purchasers who in good faith bought such bonds and stock for less than par. That question, of course, is not presented here. The Court, however, in that case laid down the doctrine, which is, we think, contrary to the opinion filed in this case, that "it is manifest that any attempt to gauge the liability of stockholders by the exact time they took their stock with reference to the dates when the several claims of the creditors accrued, and by the further fact whether the creditors actually knew of and relied upon such stock, would, in a case like this, where the creditors and stockholders are both numerous, lead to inextricable confusion. Even the flexibility of a court of equity would be inadequate to adjust the rights of the parties." (Page 436.)

Accordingly it was held that it would be *presumed* that creditors trusted the corporation upon the faith of the increased stock, and that "the moment shares are taken, they are supposed to represent so much money put into the treasury as they are worth, which becomes available for the payment, not only of future, but of *existing creditors*." (Page 436.)

This case is also instructive because it holds that the original stockholders who voted the increase of stock and received it "full paid" and "free from all claims and demands upon the part of the company" were liable to creditors, although "*there was no evidence that the creditors of the company knew of or relied upon this increase in their dealings with the company,*" and although such

holders of the stock "had a right to return and surrender the same, which they offered to do." (Page 426.)

In the case at bar the stock issued to Andrews and Whitcomb was not declared to be "duly paid" or "non-assessable," and they never offered to return and surrender the same to the company.

Furthermore, in the Handley case the stock was *not subscribed for*, and there was no agreement to pay for it. But the Court say "the fact that they did not subscribe for it or agree to take it until the receipt of the certificates, is immaterial, as *the acceptance of the certificates is sufficient evidence of an agreement to pay their* PAR *value.*" And the Court cited to this proposition *Sanger vs. Upton*, 91 U. S., 56-64; *Chubb vs. Upton*, 95 U. S., 665; *Brigham vs. Mead*, 10 Allen, 245. (Page 427.)

See *Glen vs Porter* (*C. C. A., N. Y.*), 73 Fed. Rep., 275.

In *Welles vs. Larrabee et al.*, 36 Fed. Rep., 866, it appeared that the defendant bank which held stock as collateral security did not appear upon the stock book of the corporation as a stockholder, and consequently was not liable. It was further held that a party whose name appeared upon the stock book, with the addition of the word "trustee" after it, was not liable as a stockholder, because Section 5152 of the Revised Statutes expressly exempted from liability persons holding stock as trustees, and also for the further reason that the defendant held the stock merely as a naked trustee on behalf of the defendant bank, which was the pledgee, and the name of which bank did not appear upon the books.

In *Pauly vs. State Loan & Trust Co.*, 56 Fed. Rep., 430, it was held by District Judge Ross that the defendant, whose name appeared upon the registry of a national bank as holding stock as pledgee, was not liable under Sections 5151 and 5152 of the Revised Statutes upon the strength of the case of *Anderson vs. Warehouse Company*, 111 U. S., 479. It is clear that the Anderson case is not authority for the decision reached by Judge

Ross, but in any event his conclusions as to the proper construction of the national banking act, if inconsistent with the construction put by the Supreme Court of Wisconsin upon its statutes, would not be controlling here. In this same case, in the Court of Appeals, reported in 58 Fed. Rep., 666, that Court affirmed the judgment on the ground (1) that Judge Hanford differed from the opinion of Justice Matthews in *Easton vs. Bank,* 127 U. S., 532, in his definition of a pledge, and (2) that the statutes of California expressly provide that the pledgee acquires no property, but a mere lien upon the articles pledged.

In *Beal vs. Bank,* 67 Fed. Rep., 816, the Circuit Court of Appeals of the First Circuit held that the word "shareholders," as used in the statutes of Massachusetts, did not cover the case of a person holding stock as collateral, basing such construction largely upon a provision contained in a section of the Revised Statutes of the state. It is needless to say that the Supreme Court of Wisconsin has given a different construction to its own statutes, which are entirely dissimilar.

In *Savings Association vs. Seligman,* 92 Mo., 635, the same construction was given to the Missouri statute as was given by the Court in *Burgess vs. Seligman,* holding that the provisions of the Missouri statute exempted persons holding stock as collateral security from liability as stockholders.

The case of *Bank vs. Gustin,* 42 Minn., 327, does not discuss the question of the effect of a party shown on the stock book to be a shareholder, but the case turned upon the same question as did the case of *Whitehill vs. Jacobs,* 75 Wis., 474, wherein it was decided that "if a party deals with a corporation with full knowledge of the fact that its nominally paid up capital has not in fact been paid for in money or property to the full amount of its par value, he deals solely on the faith of what has actually been paid in and has no equitable right to insist upon the contribution of a greater amount of capital by the shareholders than the corporation itself could claim as part of its assets." The

Court in the Minnesota case, as in the Whitehill case, enforced the doctrine of estoppel as against the creditor who contracted with full knowledge that the stock had been issued without having been fully paid.

In *Bank vs. Bank,* L. R. 6 Q. B., 196, cited in the opinion it was held that a savings bank holding, as pledgee, bank shares, was not liable as a stockholder, because it had no right under the law governing savings banks to own the same.

See *Thompson on Corp.*, Section 3213, page 2314.

It will thus be seen that none of the cases cited in the opinion of Judge Woods filed in this case militate against the proposition for which we are now contending.

The stock book of the company would have shown from any date from October 18, 1890, when the stock was issued to Andrews and Whitcomb, to the 20th of December, 1890, when the endorsement was made on the stubs, that Andrews and Whitcomb were the absolute owners of the stock. From the 20th of December, 1890, to the 12th of January, 1891, the stub of the stock book would have shown that although the certificates were issued to Andrews and Whitcomb, Garland and Todd were the owners of the stock and Andrews and Whitcomb were the pledgees. After Jan. 12, 1891, although not shown on the stock book, the interest of Garland as owner and purchaser as a matter of fact became extinguished, and all his interest in the stock on that day was transferred to Andrews and Whitcomb.

Although the contract for delivery of the pipe by the complainant was made August 28, 1890, the pipe was not fully delivered and the contract fulfilled until November 24, 1890. (Record, pages 107-108.) On that date the indebtedness of the complainant accrued, and on that date Andrews and Whitcomb were the stockholders of record, liable to creditors on the stock book of the company.

Wing vs. Slater, 35 At. Rep. (R. I.), 302, and cases cited.

At the time of the commencement of the creditors' suit they appeared upon the stub of the stock book holding the stock as pledgees, but as a matter of fact all interest of the pledgor had then been transferred to them.

As to what stockholders are liable the courts generally hold that the expression "stockholders" "must be regarded, in the absence of any legislative indication to the contrary, as including not only those who were such at the time the indebtedness was incurred, but all those who successively stand in their shoes in respect to the same stock. The liability being because of the ownership of stock, it follows that into whosesoever hands it may go and whoever purchases it does so at the risk of this liability."

Root vs Linnock, 120 Ill., 350.

The Supreme Court of Wisconsin has laid down the same rule.

Cleveland vs. Burnham, 55 Wis., 598.
Cleveland vs. Burnham, 60 Wis., 16-21.
Day vs. Vinson, 78 Wis., 198-201.
See *Thompson on Liability of Stockholders*, Sec. 90.

But in this case Andrews and Whitcomb were holders of the legal title of record at both dates.

When this suit was commenced, all equities, if any, theretofore held by Garland or the Oconto Water Company in this stock, had been cut off by Andrews and Whitcomb, and they claimed to own the stock absolutely.

The endorsement upon the stubs, made at the request of Whitcomb, was not such a transfer under the statute as would relieve Andrews and Whitcomb from liability to creditors as stockholders of record. A creditor seeking information from the stock book would be told that they held the certificates, and no transfer had been made thereon by them, or under their authority, to Garland and Todd as owners. No acknowledgment

appears upon the stock book from them that their title or interest in the stock was any less or otherwise than that arising from the holding of the certificates as shown by both the stock book and the certificates. A creditor needed not to inquire further.

In *Application of Thomas Murphy,* 51 Wis., 519, the Court rely upon the interpretation given to the statute in question by the Supreme Court of Maine, from which state the statute was borrowed. We have seen that in *Stanley vs. Stanley,* 26 Maine, 191, the stock books are held *conclusive* evidence as to who are stockholders. In the Murphy case the opinion cites *Union Bank vs. Ladd,* 2 Wheat., 390, and we may add that this case has been followed in *Hammond vs. Hastings,* 134 U. S., 401. Those cases clearly hold the doctrine that Andrews and Whitcomb, having the legal title of the stock as shown by the stock books from October 18th, to December 20th, 1890, could not divest themselves of the legal title so as to avoid liability to the bank or its creditors for the amount unpaid upon their shares, by having the secretary make the endorsement upon the stubs. Such endorsement was not a compliance with the terms of the statute, with the charter of the corporation, or the requirements of the certificates of stock with respect to such transfer, and hence the stub endorsements were a nullity.

See *3 Thompson on Corp.,* Sec. 3192, and cases cited.

The record shows that Andrews and Whitcomb on the 20th of December, 1890, desired the endorsements upon the stubs in the stock book to be made by the secretary, in order to relieve themselves of liability as stockholders. (Record, page 252 and page 616.) The record further discloses that Garland was wholly insolvent. If one who allows himself to appear on the books of a corporation as an owner of its stock, is liable to creditors as a shareholder, whether he be the absolute owner or a pledgee only, and if, so registered, he transfers his stock for the purpose of escaping liability, the transaction is void as to creditors, and he remains liable upon his stock.

Bowden vs. Johnson, 107 U. S., 251.
Anderson vs. Phil. W. Co., 111 U. S., 479.
Stuart vs. Hayden (C. C. A., 8th Cir.), 72 Fed. R., 402.
Foster vs. Lincoln, et al. (C. C. Vt.), 74 Fed. R., 382.

If the Court of Appeals was right in holding that Andrews and Whitcomb were not liable as stockholders, it should have determined whether Garland and Todd and Sturtevant were liable or directed proceedings to be taken in the court below to ascertain such liability. The bill should not have been dismissed for want of equity.

VII.

The Court of Appeals Erred in Holding in Effect That Andrews and Whitcomb are Entitled to Affirmative Relief.

On November 5, 1896, counsel for appellants filed in the Court of Appeals a "Suggestion as to the Mandate," whereby it was claimed that the Court of Appeals "having determined that the water plant goes with the franchise, it is submitted to the Court that the mandate in this case, in order that the decree to be entered below may end the litigation, should direct that provision be made in the decree for the conveyance to appellant Oconto City Water Supply Company of the legal title to the land holding the pumping station and wells of the water works plant." (Record in Court of Appeals, pp. 825-827.)

Since the obtaining of the certified copy of the transcript from the clerk of the Circuit Court of Appeals to be used upon this application, counsel for appellants have filed in the Court of Appeals a motion, "first, to alter its mandate herein so that the same shall direct that provision be made in the decree to be entered below for conveyance to appellant Oconto City Water Supply Company, of the legal title to the land holding the pumping station and wells of the water works plant mentioned in the

record and for the return to the appellants S. D. Andrews and W. H. Whitcomb, or their assigns, by the clerk of the Circuit Court for the Eastern District of Wisconsin, of the bonds delivered to said clerk by said appellants pursuant to the order of the court below, and second, that the mandate so amended issue forthwith to the court below."

This motion has not been heard or determined, but it, together with the suggestion as to the mandate appearing in this record, well illustrate the situation in which the parties are left by the decison of the Court of Appeals, which by the logic of its decision may and probably will amend its mandate to the lower court, as suggested.

We, elsewhere in this brief, have shown that under the statutes of Wisconsin the complainant, as a judgment creditor with execution returned unsatisfied, had the right to file its bill for the sequestration of the property of the Oconto Water Company as an insolvent corporation, for the setting aside of fraudulent or illegal liens, collecting in the assets, including the amounts unpaid upon its capital stock, determining priorities of liens, and distributing the property or proceeds of the sale thereof among its secured and unsecured creditors in the order of their priority as prescribed by the statute.

It is well settled that rights created or provided by the statutes of any state may be enforced and administered in the national courts, either at law or in equity and that "a party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality."

Darragh vs. Mfg. Co. (C. C. App., 8th Cir.), 78 Fed. Rep., 7.

It is, however, also well settled that a complainant going into the federal court must in all respects conform to the rules of practice and procedure in such court. One of such car-

dinal rules is that "where a bill is filed to set aside an agreement or conveyance, the conveyance cannot be established without a cross-bill filed by the defendant."

Carnochan vs. Christie, 11 Wheat., 447.

"It is well settled that any affirmative relief sought by a defendant in an equity suit must be by cross-bill, and can never be granted upon the facts stated in the answer."

Hill vs. Grocery Co. (C. C. App., 5th Cir.), 78 Fed., 21, citing Judge McCrory in *Chapin vs. Walker*, 6 Fed. Rep., 795-796.

"It is hardly necessary to repeat the axioms in the equity law of procedure, that the allegations and proofs must agree," that the Court can consider only what is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavailing and that the decree must conform to the scope and object of the prayer, and cannot go beyond them. Certainly without the aid of a cross bill the Court was not authorized to decree against the complainants the opposite of the relief which they sought by their bills."

R. R. vs. Bradleys, 10 Wall., 302.

By reference to the bill of complaint in this case it will be seen that it alleged that the various instruments executed by the Oconto Water Company to Andrews and Whitcomb were illegal and void, and the Court was asked to adjudicate them fraudulent and void, together with the issue and delivery of the mortgage bonds. (Record, p. 16.)

There was no allegation or claim in the answer of the appellants that "the franchise was the principal thing and the tangible property a mere incident thereto," or that the mortgage of the rights under the ordinance of the City of Oconto covered the subsequently constructed water plant and the subsequently acquired tangible property or that any title to the real estate upon which the plant was located or which might be subsequently

acquired and deeded by the City of Oconto to the Oconto Water Company should be conveyed by the Oconto Water Company to either Andrews and Whitcomb or the Oconto City Water Supply Company.

It will be remembered that the Oconto City Water Supply Company filed no answer in the case. The only allegations in the answer of Andrews and Whitcomb filed, which might be claimed as bearing upon these several matters, are as follows:

"That at once upon receiving from said referee the instrument or bill of sale given them by him upon such sale, being the original of 'Exhibit F' attached to this report and referred to therein, these defendants then being in the actual possession of the entire capital stock of said company, and of the one hundred bonds of said company so as aforesaid delivered to them by said company, took actual possession of said company's water works system or plant in said City of Oconto, and of the whole thereof, and have ever since retained the actual possession of all of said property, claiming to own the same under said referee's sale thereof to them."

"Eighty-first. That said water works system or plant so as aforesaid taken possession of by these defendants after such sale, consisted of its pumping station and well from which it obtains the water supplied to said city and its inhabitants, located upon the piece, parcel or tract of land situated in said City of Oconto, the legal title to which is in said City of Oconto, with an existing right in said company to acquire the title thereto at any time by paying to said City of Oconto the sum of $1,500, and said company's pipe system extending from said tract, piece or parcel of land throughout said city under its streets; that said tract, piece or parcel of land is a necessary and essential part of said water works system or plant and a necessary appurtenant thereof; and is essential to the use and enjoyment of the franchise under which said company constructed said water works system."

"Eighty-second. That the only other property, which said Oconto Water Company owned or possessed or had any interest in at the time these defendants took possession of the water works system as aforesaid, consisted of a lot of iron pipe as follows: Eight lengths of six-inch pipe; twenty-five lengths of eight-inch pipe; six lengths of ten-inch pipe and seven lengths of twelve-inch pipe, all of which said company owned and was in the actual possession of at said City of Oconto at the time said contract of May 16, 1891, between said company and these defendants was executed as hereinbefore stated; said contract being the original of 'Exhibit H' of this answer, the market value of which pipe did not then and does not now exceed $415." (Record, pages 73-74.)

The prayer of the bill was simply "to be hence dismissed with their reasonable charges in this behalf most wrongfully sustained." (Record, p. 77.)

It appears from the record that when the cause came on to be heard the complainant, by leave of Court, filed an amendment to its bill setting up, among other things, that since the filing of its bill, a decree had been entered giving it a mechanic's lien upon the water works plant and ordering a sale of the same, together with the franchise of operating it. (Record, page 167.)

Thereupon Andrews and Whitcomb filed amendments to their answer, admitting that the mechanic's lien decree had been obtained and claiming that such decree was void as against them, "because no law in force in the State of Wisconsin at any time prior or subsequent to complainant's contract with said Oconto Water Company for the sale and delivery of said pipe or material, gave, granted or created any right to the lien upon any of the property upon which said decree, in terms, declares or extends a lien."

And the amendment concludes as follows:

"And these defendants ask that this their amended answer to complainant's bill, be treated and considered by the Court, so far

as the same is applicable thereto, as their answer to any other lien claims herein, whether resting in decree or otherwise, made, filed or otherwise asserted in this action by any party or parties intervening herein, and that this, their amended answer, may be considered as a cross-bill herein to complainant's said amended bill and to any petition of intervention filed herein, and that such affirmative relief as defendants, under the law and the rules and practice of this Court may be entitled to, be granted them herein, and especially that complainant's claim for a lien herein, and all other claims for a lien herein, whether based upon decree, judgment or other form of claim, be, as against these defendants and those claiming under them, and as against any interest which they or either or any of them, may be decreed to have in any of the property affected by this action, decreed to be of no force or effect and absolutely void and cancelled." (Record, pages 173-4.)

It will thus be seen that none of the defendants filed any cross-bill asking that the mortgages, upon which they based their lien or title to the water works plant, be declared valid and binding as against the creditors of the Oconto Water Company, or that such mortgages covered the entire franchises or the subsequently constructed water works plant and subsequently acquired tangible property of the Oconto Water Company, or that the Oconto Water Company should convey either to Andrews and Whitcomb or to the Oconto City Water Supply Co. title to any land which it might subsequently obtain, or the mortgage bonds should be declared valid and retained by, or returned to Andrews and Whitcomb.

In other words, the pleadings do not warrant the affirmative relief which the Court of Appeals has by its decision held, or which by its mandate, if amended, it will award to the appellants in this case. Even that portion of the decree, to-wit, "that the said instruments executed in the name of the Oconto Water Company to said defendants Andrews and Whitcomb were made

in good faith, and for a valuable consideration, and were not withheld from record by their procurement, nor with their consent, nor in fraud of creditors" (Record, p. 674), went beyond the scope and object of the defendants' answer and came within the rule that "without the aid of a cross-bill the Court could not have decreed the sale of the property covered by the trust deed. It could only have dismissed the bills of the complainants and have denied the relief sought."

R. R. Co. vs. Bradleys, supra.

The unrecorded instrument of September 15th was void as against creditors for several reasons:

(1) Such instrument has not been authorized by the board of directors of the company nor had a "majority of its stockholders" assented thereto, as required by Subdivision 7 of Section 1748, R. S. Wis.

Bank vs. Trust Co., 14 Wis., 325.
Galloway vs. Hamilton, 68 Wis., 651.
Gashweiler vs. Willis, 33 Cal., 11.
Alta Co. vs. M. Co., 78 Cal., 629.
Hoyt vs. Thompson, 1 Sel., 320.
Cook vs. Tullis, 18 Wall., 332.
Koeler vs. Black R. F. Co., 2 Black, 715.

(2) The instrument was kept from record by an arrangement between the mortgagor and the mortgagee, that the credit of the former should not be injured, and creditors gave credit to the mortgagor upon the faith that its property was unencumbered.

Standard P. Co. vs. Guenther, 67 Wis., 101.
Sanger vs. Guenther, 73 Wis., 354.

(3) At the time of the execution of the instrument the company was insolvent and could not create a preference by mort-

gage in favor of one creditor over another, particularly a party employed by and interested in the corporation.

Haywood vs. Lumber Co., 64 Wis., 639.
Ballin vs. Loeb, 78 Wis., 404.
Ford vs. Bank, 87 Wis., 363.
Graham vs. R. R. Co., 102 U. S., 148.

(4) Under the statutes of Wisconsin the ordinance or franchise covered by the mortgage to Andrews and Whitcomb was personal property.

State ex rel. Railway Co. vs. Anderson, 90 Wis., 550.

This case overrules all the *dicta* in *Yellow R. Imp. Co. vs. Wood*, 81 Wis., 560; *Fond du Lac Water Co. vs. Fond du Lac*, 82 Wis., 322; *Chapman Valve Mfg. Co. vs. Oconto Water Co.*, 89 Wis., 264; and *C., M. & St. P. Co. vs. Milwaukee*, 89 Wis., 506, relied upon by counsel for appellants, from which the conclusion has been drawn that franchises of quasi-public corporations in Wisconsin are real estate.

If franchises are personal property for the purposes of taxation, it is difficult to see why they should not be considered personal property for purposes of mortgage or transfer. That this franchise was considered personal property by Andrews and Whitcomb or their attorneys at all times, is evident from the form of the instrument, and from the proceedings taken in the Circuit Court of Oconto County, known as the foreclosure proceedings. They cannot now say the property covered by it was not personal property.

Walling vs. Miller, 108 N. Y., 173.
Horn vs. Bank, 125 Ind., 381.

If this franchise was personal property, the instrument of September 13th was a chattel mortgage. If it was a chattel mortgage, it was, as against the complainant and other creditors

absolutely void under the statutes of Wisconsin, because not delivered, and not filed for record.

"No mortgage of personal property shall be valid against any other person than the parties thereto, unless the possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage or a copy thereof be filed as provided in the next section, except when otherwise directed in these statutes."

R. S. Wis., Sec. 2313.
Maier vs. Davis, 57 Wis., 212.

Such instrument was also void because the property and plant of the company was acquired or constructed subsequent to its execution, and was not covered thereby for the reasons:

First. Such instrument did not purport to cover subsequently acquired property; and

Second. If it had it would have been void as to such property.

Bank vs. Knowles, 67 Wis., 373-86.
Comstock vs. Scales, 7 Wis., 159.

To render a mortgage void as against creditors furnishing material on the faith of the property being unencumbered, it is not essential to show that there was an *actual* agreement between the mortgagor and the mortgagee that the instrument should not be put upon record. It is sufficient if the instrument was kept from the files through a fraudulent purpose on the part of the mortgagor, which fraudulent purpose was allowed to be carried out by reason of *neglect* or *laches* on the part of the mortgagee. Nor is it material whether the instrument so kept as a secret lien was a chattel or real estate mortgage.

Valley L. Co. vs. Hogan, 85 Wis., 366.
Smythe vs. Sprague, 149 Mass., 310.
Hungerford vs. Earle, 2 Vern., 261.

Hildreth vs. Sands, 2 John Ch., 48.
Blennerhasset vs. Sherman, 105 U. S., 117.
Neslin vs. Wells, 104 U. S., 428.
Bacon vs. Harris, 62 Fed. Rep., 99.

VIII.

The Act of Congress Gives the Right to Make an Application to this Court for a Writ of Certiorari to the Court of Appeals.

In view of the sharp conflict of opinions between Circuit Judge Jenkins and Circuit Judge Woods on material questions of public importance decided in this case, although the application to have these questions certified by the Court of Appeals to this Court was denied, yet Judge Woods seemed to favor the application we are now making by saying that it was our privilege to move this Court for an order requiring the case to be certified here for review and determination. We have followed the suggestion and hope we have not abused our privilege by filing a too extended brief in support of it.

We confidently ask on behalf of the petitioners that they may have the relief prayed for.

GEO. H. NOYES,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1896.

Office Supreme Court, U. S.
FILED.
APR 17 1897
JAMES H. McKENNEY,
CLERK.

Nos. 725-726.

S. D. ANDREWS, W. H. WHITCOMB AND OCONTO CITY WATER SUPPLY COMPANY,
Appellants,

vs.

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THE CITY OF OCONTO,
Appellant,

vs.

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Statement and Brief of Appellants in Opposition to Appellee's Petition Herein for a Writ of Certiorari.

W. H. WEBSTER,
Solicitor for Appellants.

THE EVENING WISCONSIN COMPANY, MILWAUKEE.

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The petitioner's brief in support of its petition for this writ was served too late to admit of a new arrangement by appellants, before the date noticed for formal presentation of the petition to this Court, of the facts and issues in this case as they were presented to the Court of Appeals, and inasmuch as such brief of petitioner, in its statement of the facts, is by no means full and fails to support the statements of fact by reference to the record, appellants have considered it essential, in order that the Court may have a fuller knowledge of the facts and issues in the case, to oppose this application with substantially the same statement and brief with which they supported their appeal from the judgment of the trial Court to the Court of Appeals.

The references are to the paging of the record printed upon their appeal to the Court of Appeals and which, so far as it goes, constitutes the transcript of the record used here on this application by appellee.

STATEMENT OF THE CASE.

First. The defendant, City of Oconto, is a municipal corporation of Oconto County, Wisconsin.

Second. Sub-chapter 4 of the charter (Ch. 56, Laws of 1882) treats of the Common Council and its powers, the 11th subdivision of which—p. 211—reads as follows:

> "11th. To make and establish public pounds, pumps, "wells, cisterns and reservoirs, and to provide for the "erection of water-works for the supply of water to the in- "habitants of the city."

Third. Section 930a of Sanborn & Berryman's Annotated Statutes of Wisconsin reads as follows:

> "Section 930a (Ch. 125, 1879). 1. The Common "Council of every city * * * * in the State of Wis- "consin are hereby authorized to permit, subject to such "rules and regulations as they may prescribe, and such "conditions as they may impose, the laying of pipes in "the streets and alleys of their respective cities and vil- "lages, and the maintenance and use of such pipes for "the purposes of conveying water, steam, or either, under "the surface of such streets and alleys. * * * *
>
> "3. This act shall be construed to be an amendment "of every city charter of the State of Wisconsin wherein "the authority herein given is not already contained; pro- "vided always, that nothing in this act contained shall be "so construed as to affect the franchise or vested rights of "any water company in this state.

Fourth. Section 1780 of the same statutes reads as follows:

> "Section 1780. (As amended by Ch. 211, 1879.) Any "corporation formed * * * * for the purpose of "constructing and operating water-works in any city or "village in this state may make and enter into any con- "tract with such city or village to supply such city or "village with water for fire or other purposes, upon such "terms and conditions as may be agreed upon, and may, "by the consent of and in the manner agreed upon with "the proper authorities of such city or village, use any "street, alley, lane, park or public grounds for laying "water pipes therein; provided, no permanent injury shall "be done to the same; and any such city or village may, "by contract, duly executed by the proper authorities, ac- "quire the right to use the water supplied by such cor- "poration, or such portion thereof as it may desire, upon "terms and conditions as may be agreed upon by such "corporation and the authorities of such city or village.

"Every such corporation heretofore organized shall con-
"tinue to enjoy the rights given by the law under which
"it was formed."

Fifth. July 8, 1890, the defendant, Oconto Water Company, incorporated under the laws of Wisconsin, with a capital stock of $100,000.00, divided into 1,000 shares of $100.00 each,

"for the purpose of constructing and operating water-
"works in the City of Oconto, Wisconsin, for supplying
"said city and its inhabitants with water for protection
"against fire and for domestic, manufacturing and other
"purposes." Corporate Articles—p. 547, Record.

Sixth. The next day—July 9th—the city, by its Ordinance No. 153, granted to the Water Company the franchise

"to construct, own, maintain and operate water-works in
"the City of Oconto; to lay pipes for the carrying and
"distributing of water in any of the streets, avenues, alleys,
"lanes, bridges or public grounds of the city as now or
"may hereafter be laid out; to acquire and hold as by
"law authorized any and all real estate, easements and
"water rights necessary to that end and purpose, with all
"necessary and proper buildings, wells, conduits or other
"means of obtaining water supply, with all necessary ma-
"chinery and attachments thereto, to supply the city and
"its inhabitants thereof with good and wholesome water
"suitable for fire and domestic purposes, and for this pur-
"pose to enter upon any street, avenue, alley, lane, stream,
"bridge or public ground under control of the city; to
"take up any pavement or sidewalk thereon, and make
"excavations as may be necessary for the laying of such
"pipe and attachments." §1 of Ordinance, p. 81, Record.

Seventh. At the time these franchises vested in the Water Company they constituted its only property: Garland's deposition, fols. 334-5, Record.

Eighth. Chapter 86 of Sanborn & Berryman's Annotated Statutes of Wisconsin treats of the organization of corporations, and Section 1773 of those statutes reads as follows:

"Section 1773. Until the directors or trustees shall be
"elected, the signers of the articles of organization shall
"have direction of the affairs of the corporation, and make
"such rules as may be necessary for perfecting its organi-
"zation, accepting members or regulating the subscription
"to the capital stock. In stock corporations the first meet-
"ing may be held at any time after one-half of the capital
"stock shall have been subscribed; * * * No such
"corporation shall transact business with any others than
"its members, until at least one-half of its capital shall
"have been duly subscribed, and at least twenty per cen-
"tum thereof actually paid in; and if any obligation shall
"be contracted in violation hereof, the corporation offend-
"ing shall have no right of action thereon; but the stock-

"holders then existing of such corporation shall be person-
"ally liable upon the same."

Ninth. On the 15th of the month—July—one-half of the capital stock was subscribed for as follows:

By Garland—the chief promoter—490 shares;

By Todd—another promoter—7 shares;

By Barnes—an incorporator—one share;

By McCabe—an incorporator—one share;

By Crippene—an incorporator—one share; Garland's deposition, fol. 305, Record, and p. 8, Record Book of Oconto Water Company (being Ex. 14 of Andrews' deposition taken in garnishee case: fols. 238, 240, Record).

Tenth. Upon these subscriptions being made—the stock was not issued until October 1st (see stock ctfs. pp. 519, 527, Record)—the subscribers, as stockholders, held their first meeting and elected Garland, Todd and Barnes directors, and adopted a corporate seal and the following resolution:

"*Resolved*, That the board of directors of this corpora-
"tion be, and they are hereby authorized and directed to
"purchase the necessary real estate at and near the said
"City of Oconto, Wisconsin, as may be necessary for the
"uses of the company, at such rates as they may be able
"to secure the same, and also to receive proposals and to
"contract for the erection and construction of such build-
"ings and works as may be necessary for such water-works
"complete."—Fols. 35–6, Record—and adjourned.

Eleventh. The directors met the same day and elected Garland president and Todd secretary and treasurer of the company, whereupon Garland reported to the directors that $20,000.00 of the capital stock subscribed for had been placed in his hands, and he was then directed by the directors to pay the same over to the treasurer, and the treasurer then reported to the directors the sum of $20,000.00 received from Garland for subscription on stock; fol. 37, Record. This sum of $20,000.00 consisted of Garland's check on the Garland Banking Company, of Minneapolis, to the order of F. H. Todd, treasurer of the Water Company. It was never paid, was never presented for payment, was given ostensibly as payment of the twenty per cent. of the capital stock required by the statute—§ 1773, *supra*—and no other money payment was ever made for any of the stock: Garland's deposition, fols. 306–7, Record. Garland refused to say whether the check was good for anything or would have been paid if presented: Cross-examination, fol. 390, p. 322, Record. The Court below says in its opinion—fol. 972, p. 714, Record:

"It may be fairly said that none of this stock was ac-
"tually paid for by parties subscribing, and that they were
"severally liable to the company and its creditors for the
"amount of their respective subscriptions."

The directors then adopted a resolution accepting the fran-

chise granted by the City of Oconto, and adjourned: Fols. 37–8, Record.

August 6th, Barnes resigned as a director (leaving Garland and Todd the only directors) and after that date took no part as a director of the company: Garland's dep., fol. 310, p. 253, Record.

Twelfth. There was no other stockholders' or directors' meeting until Oct. 29th: Fol. 320, Record.

Thirteenth. Garland and Todd were the sole promoters of the Oconto Water-Works enterprise, and in consideration of having procured the incorporation of the company and its franchise from the city of Oconto, were, upon the organization of the company, its sole beneficiaries and were so recognized by the directors and stockholders. Barnes, the other director and a subscriber to one share of stock, and McCabe and Crippene, subscribers each to one share of stock, acting merely in a nominal capacity in the interest of Garland to provide a working membership for the corporation: Garland's deposition, fols. 333 to 338, inclusive, Record.

Fourteenth. Without being otherwise than by the stockholders' resolution quoted in the *Tenth* paragraph above, invested by the directors or stockholders with any authority so to do, Garland and Todd at once after the adjournment of the directors' meeting, proceeded with the work of providing for the construction of the Water-Works plant. They had on July 14th—the day before the stock was subscribed—contracted, in their individual names, with C. E. Gray, Jr., & Co., under which contract the latter company were to and did do the work of constructing the pipe line: fol. 344-5, Record. (This contract was omitted from the printed record by stipulation, but is Ex. "I" at the end of this brief.)

Fifteenth. August 28th the Water Company through Garland and Todd—pp. 352, 353, Record—contracted with complainant for the purchase of the pipe—p. 109, Record—which was the first material purchased—fol. 358, Record. It was to be paid for "one-third cash thirty days from date of delivery at Oconto; balance four months from same date as cash payment, at six per cent. interest:" Ex. "7" of A. C. Overholt's deposition in the lien case, fol. 46, p. 353, Record. (This exhibit was omitted from the printed record by stipulation and will be found as Ex. "2" at the end of this brief.) As the first delivery at Oconto took place Sept. 8th—fol. 149, Record,—nothing became due for this material before Oct. 8th following. Oct. 20th complainant drew a draft on the Oconto Water Company for $2,000.00, the first installment due, which was paid on presentation: fol. 47, p. 354, Record. This delivery on September 8th at Oconto, must be understood, however, as the date when the cars containing the pipe reached that city, for the undisputed tstimony in the case shows that there was no money with which

to pay the freight until September 16th, when money, the first the company had, was obtained upon a draft drawn that day upon appellants Andrews and Whitcomb by the treasurer of the company, Todd, under a contract made with such appellants September 13th, as stated in the next paragraph.

Sixteenth. Having incorporated the company, procured its franchises, completed its organization, contracted for the pipe and construction of the pipe line, with pipe on the cars at Oconto, but having no money with which to pay freight bills or begin construction work, Garland and Todd, for the company, with the same but no other authority than that under which these previous acts were engaged in by them, were, shortly before Sept. 13th, brought into communication with the appellants Andrews and Whitcomb by Mr. Georgg W. Sturtevant, Jr., a civil engineer in the construction of water-works plants—Sturtevant's deposition, fol. 538, Record—to whom Garland and Todd, after organizing the Water Company, had appealed for assistance—Sturtevant's deposition, fol. 508, and Garland's deposition, fol. 311, Record. Prior to this appeal to Mr. Sturtevant, Andrews and Whitcomb were entire strangers to Garland and Todd and had not heard of the Oconto Water-Works enterprise—Andrews' deposition, fol. 225, and Garland's deposition, fol. 311, Record. In accordance with arrangements made by Sturtevant, the parties (Sturtevant, Andrews—representing Andrews & Whitcomb—and Todd—representing the Water Company) met at the Brevoort Hotel in Chicago, September 11, and passed the day there acquainting Mr. Andrews with the nature of the enterprise and the Oconto Water Company's franchise—Sturtevant's deposition, fols. 508-9, Record. From Chicago Mr. Todd went to Menasha, Wisconsin, on the same day, and Mr. Andrews and Mr. Sturtevant to Oconto, reaching there on the morning of the 12th. They passed the day in Oconto looking over the city and examining the records of the Water Company, meeting the city officers and examining the site for the pumping station and going over the streets of the city—Sturtevant's deposition, fols. 509, 510, Record. No construction work had then been commenced; *id.* fols. 510, and 544; Andrews' dep., fols. 586, 587, Record. They returned to Menasha the same night and there met Garland and Todd, where they all remained until late in the evening of the 13th, when they came to an agreement for the loan by Andrews & Whitcomb to the Water Company of $40,000.00, which they there reduced to writing and signed, which agreement is Exhibit "D," page 91, Record. The company had no funds with which to pay freight bills on the pipe or begin work—Sturtevant's deposition, questions 62-3-4 and answers, fol. 515; questions 104-5-6 and answers, fol. 551; questions 120-1-2 and answers, fol. 554; Garland's deposition, fol. 315, Record—and the agreement, Exhibit

"D," was reduced to writing and signed that night so that the company could draw money to pay freight bills and begin work the following week—Sturtevant's deposition, question 55 and answer, fol. 514, Record; Andrews' deposition, questions 55-6-7-8 and answers, fol. 590 and questions 38 to 43, inc., and answers, fols. 617, 618, Record.

Seventeenth: During the day—the 13th—while the terms of the agreement for the loan were under discussion, Garland and Sturtevant went to the bank at Menasha and arranged to have it left there, or with Silas Bullard, one of its officers, when it should be completed: Sturtevant's deposition, Q. 49 and answer, fols. 513-14; Garland's deposition, fol. 317; Andrews' deposition, fol. 613, Record. The object of making this deposit was to have the instrument stand for the benefit of both parties until formal duplicates, one for each, could be prepared and executed, which it was too late to do that night after the agreement was concluded, and Garland wanted a contract drawn then upon which money could be had to begin work with the following week: Sturtevant's deposition, fols. 514-15, and Q. 92, fol. 520; Garland's deposition, fols. 349-350; Andrews' deposition, fols. 590-1, 613-14, Record. The agreement, Exhibit "D," was not signed until late in the evening—Andrews' deposition, fols. 591-2, Record—and Garland started for Minneapolis and Sturtevant for Chicago the same night, leaving Andrews and Todd at Menasha, where they remained until the next Monday evening, the 15th, Andrews' dep., fols. 591-2, Record—and during the day, the 15th, in the morning, they deposited the agreement: *id.* fol. 605, p. 455 and fol. 616, p. 457, Record.

Eighteenth: By the terms of Exhibit "D," Andrews & Whitcomb were to furnish the Water Company $40,000.00 between September 13th and Jan. 1st following, at 7 per cent. interest, in sums as follows: $5,000.00 on or before October 1st and the balance as needed; notes to be given by the company for the amounts as furnished. As security for repayment of the loan the Company was to make immediate transfer in trust to Andrews and Whitcomb of the Water-Works franchise "as issued to said Oconto Water Company," its entire capital stock and $100,000.00 in its first mortgage bonds, the bonds to be secured by deed of trust on the entire Water-Works franchise.

This agreement, Exhibit "D," has been known throughout the case as the "Memorandum Agreement" and "Menasha Agreement" and is so referred to by the Circuit Judge in his opinion—p. 714, Record—and the purpose which the parties had in making it is disclosed by the following portion of Andrews' deposition brought out by complainant's counsel on cross-examination, to-wit: pp. 464, 465, Record—

"Q. 128. During the conversation at Menasha what was

said about this preliminary contract being for a temporary purpose?

A. I don't remember what particularly was said.

Q. 129. It was stated, was it not, that this memorandum which you signed was only to be deposited and used until duplicate contracts should be written out and signed by all the parties and sealed by the company's seal?

A. That was the agreement.

Q. 123. It was also understood, was it not, that this loan and this contract and assignment given to represent it were only for a temporary supply of money to the company until the bonds could be engraved and issued under a mortgage of the whole franchise and property and be sold?

A. It was not to be released until the conditions of that agreement had been complied with.

Q. 124. And was it not a part of the scheme which you agreed upon and which was understood to be carried out that the bonds were to be sold when the plant had been completed to the extent that the $40,000.00 would furnish the means for doing it?

A. Yes, sir, I think it was."

Nineteenth: In partial execution of the agreement Exhibit "D" and before separating after the same was signed, Garland and Todd as officers of the Water Company made and delivered to Andrews the Company's note to Andrews & Whitcomb for $2,500.00, dating it the 15th, however, as they were to draw on the 15th for the first installment of the loan: Andrews' deposition, fols. 591, 614 and 641, 642; Ex. "L," p. 501, Record.

Twentieth: Some time afterwards formal duplicates of the Menasha agreement were made and delivered, of which Exhibit "A," p. 78, Record, is one; Andrews' deposition, fols., 256, 590, Record. The only difference between the duplicates and the Menasha agreement, Exhibit "D,", is this: Exhibit "D" names "S. D. Andrews et als." as first parties and is not signed by Mr. Whitcomb and is not under seal; the duplicates are signed by both Andrews and Whitcomb and are under seal. The answer alleges and the proof shows that Andrews was acting for the firm of Andrews & Whitcomb—par. 27th of Answer, p. 27; Andrews' deposition, fols. 585-6; Todd's deposition, fol. 814, Record.

Twenty-first: In further performance of the agreement Exhibit "D," Garland, the day after it was executed—the 14th —upon receipt by him at Minneapolis of the following telegram from Todd (sent from Menasha) to-wit:

"Sept. 14, 1890, Menasha, Wis.

To C. C. Garland,
82 Willow Street.

Make assignment of ranchise to W. H. Whitcomb and S. D. Andrews and send here on Sunday.

(Signed) F. H. Todd,"

made, executed and forwarded to Todd at Menasha the assignment of the franchise called for by that exhibit—Garland's dep., fol. 312, Record—which is Exhibit "B," p. 80, Record—Andrews' dep., fols. 230, 276, Record. Mr. Todd received, signed and sealed it while at Menasha—Todd's dep., Q. 44 and Ans., fol. 828, p. 613, Record. Nothing having been said about recording the papers while the parties were at Menasha, Andrews, while *en route* to Maine from there wired Todd to have the papers recorded before forwarding them to Norway, Maine, where they—Andrews and Whitcomb—lived—Andrews' dep., fols. 593, 594, Record. Todd received the telegram and at once wired Garland—Todd's dep., fols. 815, 816, Record—as follows:

Oconto, Wis., Sept. 16, 1890.

To C. C. Garland.

Shall be in Chicago Wednesday at Hotel Brevoort. Shall have assignment recorded and returned.

Signed, F. H. Todd"—Garland's dep., fol. 316, Record. Garland wired back forbidding it—*id.* fol. 316, Record—and Todd, in consequence, sent them to the Bank at Norway for Andrews & Whitcomb, without having them recorded—Todd's dep., fol. 816, Record and Whitcomb's dep., Q. 15 *et seq.* and answers, p. 488, and Andrews' dep., Q. 71 *et seq.*, pp. 460, 461, Record—but neither Andrews or Whitcomb discovered the papers had not been recorded until the following January when they were taken from the bank where they were sent and kept, and forwarded to Andrews at Oconto; Andrews' dep., fols. 663, 666, Record. Complainant undertook to show that there was an understanding or agreement between Garland and Andrews & Whitcomb that the papers should not be recorded but as the Circuit Judge in his opinion disposing of the case below found against them on this issue, disposing of it in the following language—p. 717, Record.

"Fifth. I am of opinion that the instruments executed "by the company to Andrews & Whitcomb were made in "good faith and for a valuable consideration; that they "were not withheld from record by their procurement, nor "with their consent, nor in fraud of creditors," and see par. Thirteenth of Decree, p. 674, Record—the testimony bearing upon the question is not referred to. Garland alone asserted that such an arrangement was made at Menasha, but it is positively denied by Mr. Sturtevant and Mr. Andrews, and Mr.

Todd, the secretary of the company, testifies that he has no recollection of any such arrangement being made or any conversation upon the subject being had.

Twenty-second: It is a stipulated fact in the case—fol. 215, p. 174, Record—

> "that the said complainant did not examine or cause to be "examined, the records of the city clerk of the City of "Oconto, nor the records of the register of deeds of Oconto "County, at any time prior to or at the time of making its "contract to deliver the material to the Oconto Water Co. " . . . . . ; nor at any time before the completion of the de- "livery of the said material to the Oconto Water Com- "pany; nor did said complainant make any inquiry of "any of the officers of said Oconto Water Co. nor of said "defendants S. D. Andrews or W. H. Whitcomb, at any "time prior to making the contract for the delivery to the "defendant Oconto Water Co. of said material, nor of any "person or persons whomsoever after the making of said "contract, as to whether or not any mortgage or other in- "cumbrance had been placed upon any of the property, "rights or franchises of the Oconto Water Co."

Nor is any different state of facts made to appear on the part of any of the interveners.

The foregoing is a complete statement of every transaction of the Water Company prior to September 16, 1890.

Twenty-third: Although the officers of the Water Company had the right to draw on Andrews & Whitcomb September 15th, they did not draw until the 16th, probably because Todd and Andrews were waiting at Menasha on the 15th for the assignment of the franchise to reach them from Garland pursuant to Todd's telegram to Garland of the 14th—*Twenty-first* paragraph above—as Todd made the draft at Oconto on the 16th: last clause of stipulation, p. 654, and Exhibit 1, p. 667, Record. The balance of the $40,000.00 was all advanced before January, 1891—Andrews' dep., fol. 599, Record—and the Company's notes given therefor—*id.* fol. 600, 601, and Exhibits L, N, O, P, Q, R, S, T, U, V, and W, pp. 501, 502, Record—and all expended in carrying on the work of construction—Garland's dep., fol. 353, Record.

Twenty-fourth: A lien is claimed by complainant upon the Oconto Water Works plant and franchises for the price of the pipe it sold the Water Company. If the lien is given, it is by Section 3314, S. & B.'s Anno. Stats. of Wis., which provides that

> "Such lien shall be prior to any other lien which origi- "nates subsequent to the commencement of the construc- "tion, etc.," of the structure upon which it is laid.

Twenty-fifth: The only proof in the case—other than the recitals in the lien decrees hereinafter mentioned—of the date "of the commencement of the construction" of the Water-Works plant consists of the deposition of Mr. Mullen, a witness for complainant—pp. 639 to 651, inc., Record—who testifies wholly, and all under objection, from books he did not keep and vouchers he did not make, and, concerning the correctness of the entries in which, he testifies he had no personal knowledge, and answered "Yes, sir," to the following question: "Q. Then the only knowledge that you have of the correctness of the entries in this Ex. A (the time book relied on as showing when the construction work commenced) or any of them, or of the correctness of the entries in books, records and other vouchers of Oconto Water Company which you referred to, is simply that you find those entries in those books and assume them to be correct?"—fol. 867, Record. The time book—identified only by him—for the week ending Sept. 20th—Ex. A, p. 549, Record—shows ½ day's work on Sept. 16th of eleven men as the first work done towards construction of the plant, and even this appears (by Mr. Mullen's testimony as to what the books show) to have been done in unloading pipe from the cars and distributing it in the streets: fol. 871, Record. So that, at best, complainant's proof, incompetent as it is, shows the work did not commence until Sept. 16th.

Twenty-sixth: Sept. 17th the Water Company purchased of the intervener R. D. Wood & Co. the hydrants—intervening petition, p. 119, Record—and of the intervener Chapman Valve Manufacturing Co. the valves—intervening petition, p. 115, Record—the purchase price of which, respectively, constitutes the claim of each asserted against the Water Company in this action. These purchases were also made by the company through Garland and Todd: Garland's deposition, pp. 270–1, 309–10, Record.

Twenty-seventh: All the foregoing transactions took place while subscriptions existed for only half of the capital stock and before any stock whatever was issued, the last 500 shares being subscribed for by Garland just prior to the stockholders' second meeting, which was held Oct. 29th—Garland's dep., fols. 371–2, p. 306, and fol. 305, p. 249, Record, and the first share of stock was issued Oct. 1st: See stock shares, pp. 519 to 541, inc., and Andrews' dep., pp. 189, 190, Record.

Twenty-eighth: In the suits severally brought by complainant and the intervener R. D. Wood & Co., as hereinafter set forth, against the Water Co. for the foreclosure of their asserted lien claims, the Water Company answered, amongst other things, denying authority in Garland and Todd to make the purchases for the Company and alleging that they—Garland and Todd—were the purchasers and as such liable alone to the sellers: See

Answer in transcript of lien case, p. 343, Record. To prove that Garland and Todd were acting for the company in making the contracts and purchasing the material, counsel for complainant and the interveners examined Garland as their witness and upon his testimony upon the subject (for which see fols. 374-377, pp. 309, 310, Record) the Circuit Court (Judge Jenkins presiding) held the Company to have been the contracting party and the judgments at law and lien judgments against the water company pleaded by complainant and all the interveners herein whose claims have or have not been reduced to judgment, rest alone upon Garland's testimony in this behalf.

Twenty-ninth: With the exception of the making of the contract of Sept. 17th, with Garland, hereinafter mentioned, for the construction of the plant, and the progress of the work of construction, the Water Company had no other transaction until Sept. 29th, when it contracted, still by Garland and Todd, with the interveners Sherwood, Sutherland & Co. for the work performed by them constituting their claim against the company, which commenced Sept. 29th and terminated Jan. 30th, following: fol. 217, p. 175, Record.

Thirtieth: Oct. 1st certificates of stock amounting to $50,000 were issued to the subscribers according to their respective subscriptions, as follows:

No.	1.	To F. B. Barnes	1	share	$100.
"	2	" J. W. McCabe	"	"	100.
"	3	" W. E. Krippene	"	"	100.
"	4	" C. C. Garland	490	"	49,000.
"	5	" F. H. Todd	7	"	700.
					$50,000.;

see stubs of ctfs., pp. 519 et seq., and Andrews' dep. pp. 189, 190, Record. The next day—Oct. 2d—Barnes, McCabe and Krippene assigned the shares issued to them—Nos. 1, 2 and 3—to Garland—see back of ctfs., pp. 520, 522, 524, Record—and ctf. No. 6, for the balance of the capital stock, 500 shares, was issued to Garland—ctf. stub., p. 529 and Andrews' dep., p. 190, Record—for which there was no subscription, as he did not subscribe for it until Oct. 29th—Garland's dep., fols. 371, 372, Record.

The Circuit Judge in his opinion—top of p. 714, Record—makes the same recital of these facts with this exception: he states that "At the organization of the company in July, 1890, its entire capital stock was subscribed as follows: By Garland 990 shares, etc." He is clearly in error in this, for the testimony of Garland that he subscribed for the last 500 shares just before the stockholders' second meeting, held Oct. 29th, is undisputed.

Thirty-first: In order to comply with the provisions of Exhibit "D" obligating the Water Company to transfer its entire capital stock in pledge to Andrews & Whitcomb, Garland

and Todd seem to have thought the stock should first be issued to them and then assigned by them to Andrews & Whitcomb, for, with the exception of the three shares issued to Barnes, McCabe and Krippene, which were retained to keep a working membership of the corporation in Wisconsin, this was done *and for that purpose*;—Garland's dep., fols. 337-340, pp. 276-279, Record—and without the knowledge of either Andrews or Whitcomb who were both in Maine when this stock was so issued in Wisconsin, and Garland mailed to them there, Oct. 2nd, the ctfs. issued to himself and Todd for 997 shares—Nos. 4, 5 and 6—accompanied by the letter Exhibit "G 1" p. 516, Record. They immediately remailed the stock to Garland accompanied by the letter Exhibit "H 1"—p. 517, Record—declining to accept it in that form and requiring it to be issued to them direct. Garland received it, surrendered it to the company, had it cancelled and on Oct. 18th new ctfs.—Nos. 7, 8, 9 and 10—for 997 shares, were issued directly to Andrews & Whitcomb and mailed to them accompanied by the letter, Exhibit "J 1," p. 517, Record—which they received, and these ctfs. were thereafter held by them solely in the right of and under no other arrangement or document than the contract of September 13th, Exhibit "D;" Whitcomb's dep., Q. Q. 30-1 and answers, p. 479; and see for full account of this transfer and correspondence Whitcomb's dep., fols. 648-650, pp. 477-8-9 and Garland's dep., fols. 337-340, pp. 276-279, and opinion of Circuit Judge, p. 714, Record. When the ctfs. which had been issued to Garland and Todd—Nos. 4, 5 and 6—were mailed to Andrews & Whitcomb as above stated, they bore upon their back an executed assignment *in blank* as to name of assignee so that Andrews & Whitcomb could fill the blank with any name desired: Garland's letter Ex. "G 1," p. 516 and Circuit Judge's opinion, p. 714, Record. When or by whom the words "Andrews and Whitcomb of Norway, Maine" were written in the blank does not appear. *They* never made any assignment of them. They simply returned them as they received them and obtained ctfs. directly to themselves—Nos. 7, 8, 9 and 10—which was the entire capital stock of the company except three shares which they left in Wisconsin to keep the corporate organization intact—Exhibit "H 1," p. 517, Record—the state law requiring at least three stockholders for that purpose. They receipted for the last ctfs. as follows:

> "Know all men by these presents, that we, Andrews & Whitcomb, of Norway, Maine, do hereby acknowledge the receipt this day from Charles C. Garland, of Minneapolis, Minnesota, of the four (4) certificates, issued to us, and representing 997 shares of the capital stock of the Oconto Water Company, a corporation duly organized and now existing under and by virtue of the laws of the State of Wisconsin, being certificates of stock Nos. 7, 8, 9 and 10, in said

company, which said stock is held by us as collateral to secure the payment to us of all moneys which may be by us advanced, and the performance of all other things called for by the terms of that certain contract in writing, made and entered into in duplicate between us and the said company, a copy of which said contract is hereto attached, marked Ex. 'A', and made a part hereof.

Witness our hands this 22nd day of October, 1890.

(Signed) Andrews & Whitcomb."

Ex. "A" mentioned in the receipt was the contract of Sept. 13th between the Water Co. and Andrews & Whitcomb; fol. 244, Record.

Thirty-second: This juncture of affairs—Oct. 22nd—left the Menasha agreement—Ex. "D"—entirely executed by the Water Company in respect of the transfer to Andrews & Whitcomb of the promised securities except as to the bonds and trust deed, which were then in process of preparation—Exhibits "G 1" and "J 1," pp. 516, 517, Record—and the Water Company had received from them, on the loan account, and given its notes for $20,000—Exhibits L, N, O, P, Q, R and S, pp. 501-503, Record—out of which it was paying freight bills for complainant and construction cost, and no other claim against it had become due except the $2,000 cash installment on the pipe-purchase from complainant for which the latter had drawn on the company on the 20th—two days before—which was paid when the draft was presented: Overholt's dep., fol. 47, p. 354, Record. The pipe, hydrants and valves had been purchased and were being delivered, the labor of the intervener Sherwood, Sutherland & Co. had been contracted for and was being performed, the enterprise was progressing without a hitch *and no act of insolvency had been committed*. In the meantime, on Oct. 2nd, Barnes, McCabe and Krippene, the nominal shareholders of ctfs. 1, 2 and 3, (left in Wisconsin by Andrews & Whitcomb, on Garland's suggestion to keep the corporate organization intact—Exhibits "G 1" and "H 1," pp. 516, 517, Record) assigned their shares to Garland, who, on Oct. 15th, surrendered them for cancellation and ctfs. Nos. 11, 12 and 13, for one share each, were issued in their place to Wheeler, Elkins and N. S. Todd (father of F. H. Todd, the company's secretary), employes of the company; see ctfs. pp. 539, 541 and 543, and Andrews' dep., p. 191, Record. These were the last ctfs. issued by the Company; *id*, fol. 234, page 191, Record.

Thirty-third. Oct. 29th the second meeting of the stockholders took place and just before the meeting Garland subscribed for the last 500 shares of the stock—Garland's dep., fols. 371-2, p. 306, and fol. 305, p. 249, Record—making his total subscriptions amount to 990 shares. Although all but three shares of the entire capital stock then—at the time of Garland's

last subscription—stood in the name and were in the possession of Andrews & Whitcomb, the stock was all voted, without proxy, at this meeting, as follows:

By Garland.....	990 shares
By F. H. Todd (the sec'y)....	7 shares
By Wheeler.....	1 share
By Elkins.....	1 share
By N. S. Todd.....	1 share

Total, 1,000 shares—Andrews' dep. fols. 240-241, p. 198, Record—Garland and Todd having no other right, voting the 997 shares solely in the right of their stock subscription-contracts for the amount of stock.

Thirty-fourth: At this meeting the following preamble and resolution was unanimously adopted:

"Whereas at a meeting of the incorporators subscribers "to stock, and stockholders of this company duly called and "held at the City of Oconto, in the state of Wisconsin, on "the 15th day of July, 1890, at six o'clock p. m., a reso-"lution was unanimously passed authorizing and directing "the Board of Directors of the Company to receive proposals "and make contracts for the erection, construction and com-"plete equipment of the system of water works in said City "of Oconto, contemplated in and by that certain ordinance "of city hereinafter more particularly referred to, and

"Whereas, in pursuance of the terms of said resolution "so as aforesaid passed the Board of Directors, on behalf of "this Company and in its name and by the proper officers, "did on the 13th day of September, 1890, enter into a con-"tract in writing, bearing date on that day, with S. D. An-"drews and W. H. Whitcomb, both of Norway, Maine, "under the provisions whereof the said Andrews & Whit-"comb, on certain terms and conditions therein stated, "agreed to furnish to this company certain sums of money "to be applied towards the payment of the costs of complet-"ing said system of water works, said sums of money not to "exceed in the aggregate, however, the sum of Forty Thou-"sand Dollars ($40,000), which said contract was duly ex-"ecuted in duplicate, and one original of which is now on "file with the books and papers of this company, and is "hereby referred to and made a part hereof; and

"Whereas, since the execution as aforesaid of said con-"tract with said Andrews and Whitcomb and on the 17th "day of September, 1890, the company, through its proper "officers, entered into a contract in writing bearing date on "that day, with Charles C. Garland, of Minneapolis, Min-"nesota, under the provisions whereof the said Garland, on "certain terms and conditions therein stated, agreed to erect,

"construct and fully equip the said system of water works, "so that when so erected, constructed and equipped the same "should comply substantially with all the terms, provisions "and requirements of that certain ordinance passed by the "common council of said city of Oconto, approved by its "mayor on the 9th day of July, 1890, and entitled 'An Or- "dinance providing for a supply of water to the city of "Oconto and its inhabitants and authorizing the Oconto "Water Co., its successors and assigns, to construct, operate "and maintain water works therein;' which said contract "was duly executed in duplicate and one original of which "is now on file with the books and papers of this company, "and is hereby referred to and made a part hereof; and

"Whereas, pursuant to the terms and provisions of said "contract between this company and said Garland, to which "reference is hereby made, the officers of this company did "on or about the third day of October, 1890, cause to be "issued to said Garland the nine hundred and ninety shares "of the capital stock of this company, by him heretofore "subscribed for, the same having been fully paid for by "said Garland, by services rendered and material furnished, "and obligations incurred and assumed by him in and about "the securing of the franchises and privileges in said ordi- "nance granted, and in and about the erection and construc- "tion by him of said system of water works according to his "agreement in said written contract set forth; and

"Whereas, by the terms of said contract with said Gar- "land, it was agreed that said Garland should have and en- "joy all the advantages that might have been had or enjoyed "by the company under its said contract with said Andrews "and Whitcomb, and that this company would do or cause "to be done any and all things which might be necessary to "cause the said Andrews and Whitcomb to carry out well "and truly the provisions and agreements by them made to "and with this company in their said written contract, on "condition that the said Garland should assume and forever "hold this company harmless from any loss or liability "which might accrue to this company by reason of its carry- "ing out of the conditions upon it imposed, and the promises "by it made in said written contract with said Andrews and "Whitcomb, all of which said conditions and promises in its "said agreement with said Garland this company duly prom- "ised to make and carry out; and

"Whereas, the said Garland, in pursuance of the terms "of the said contract between this company and the said "Andrews and Whitcomb, by him assumed as aforesaid, "did, on the 18th day of October, 1890, assign, transfer and "set over to said Andrews and Whitcomb, at their request

"and as collateral to secure the said payment of moneys by "them advanced and to be advanced under said contract the "nine hundred and ninety shares of the capital stock of this "company, theretofore issued as aforesaid to him, and did "cause said assignment and transfer of said stock to be en- "tered upon this company's book of stock certificates, and "did surrender and deliver up to this company the certifi- "cates of stock theretofore issued as aforesaid, and did cause "to be issued to said Andrews and Whitcomb as collateral "as aforesaid, certificates of stock in this company repre- "senting in the aggregate Nine Hundred and Ninety shares, "and

"Whereas, the stock so as aforesaid issued to said An- "drews and Whitcomb is held by them as collateral to se- "cure the payment to them of any moneys which have been "or may hereafter be by them advanced under their said "contract with this company, which fact more fully ap- "pears in the receipt of said Andrews and Whitcomb for "said stock, executed in duplicate to said Garland, and dated "the 22nd day of October, 1890, one of the originals where- "of is now on file with the books and papers of this com- "pany; now, therefore

"Be it Resolved: That all acts, matters and things and "each thereof, set forth in the foregoing recitals as having "been done or performed either by this company, or by the "Board of Directors of this company, or by any person or "persons in the name or on behalf of this company, whether "such acts, matters or things, or any thereof, were properly "and legally authorized, before they were so done or not, "or whether any proper record of such acts, matters or "things has been entered upon the books of rec- "ord of this company or not, be and the same "and each thereof are hereby adopted, ratified, con- "firmed, and to all intents and purposes made as "binding and as effectual as against this company, as if such "acts, matters and things, and each thereof, had been in "each instance especially authorized by the stockholders of "this company; and particularly so far as the foregoing re- "citals set forth the making of the said contract between "this company and the said Andrews and Whitcomb, and "the said contract between this company and the said "Charles C. Garland, or any act, matter or thing in any "way pertaining to said contracts or either of them, it being "intended hereby to expressly ratify, adopt and confirm said "two contracts, and each of them": pp. 14-19 of Oconto Water Company's Record Book.

After adopting the foregoing resolution these proceedings followed:

"On motion of Matt S. Wheeler, by an unanimous vote, "the secretary of this company was instructed to place upon "the book of records of this company, following the records "of this meeting, full and complete copies of the contracts "and instruments which are referred to respectively in the "foregoing preamble and resolutions introduced by F. H. "Todd, as the contract between this company and S. D. "Andrews and W. H. Whitcomb, both of Norway, Maine, "and as the contract between this company and Charles C. "Garland, and as the receipt of said Andrews and Whit- "comb, to said Garland, dated the 22nd day of October, "1890.

"On motion of Matt S. Wheeler it was voted to adjourn, "to meet at this place at 8:45 p. m. of this 29th day of Oc- "tober, 1890.

"Attest: F. H. Todd, Sec'y:" *id.* p. 19.

Immediately following the record of these proceedings was recorded at large the company's contract with Garland (which was put in evidence by complainant as Exhibit "3" of Garland's deposition: fol. 320, p. 262, Record) as follows:

"COPY OF CONTRACT BETWEEN OCONTO WATER COMPANY AND CHARLES C. GARLAND.

"This Agreement made and entered into in duplicate "this 17th day of September, A. D. 1890, by and between "Charles C. Garland, of Minneapolis, Minnesota, as party of "the first part, and the Oconto Water Company, a cor- "poration duly organized and now existing under and by "virtue of the laws of the State of Wisconsin, and having "a place of business in the City of Oconto, in said State of "Wisconsin, as party of the second part:

"Whereas, said Oconto Water Company is the grantee "in that certain ordinance passed by the common council "of said city of Oconto, approved by its Mayor on the 9th "day of July, 1890, and entitled 'An Ordinance providing "for a supply of water to the City of Oconto, and its in- "habitants, and authorizing the Oconto Water Company, "its successors and assigns, to construct, operate and main- "tain water works therein,' which said ordinance was se- "cured to said company through the personal efforts, and "at the personal expense of Charles C. Garland, and upon "the understanding then had between said Garland and said "company, that said company should pay to said Garland "the fair and reasonable value of any franchises or privi- "leges that might be secured by said Garland, and which "might be in said ordinance granted, and

"Whereas, the said company is now the holder and "owner of all franchises, privileges and immunities in and "by said ordinance granted or conferred, and

"Whereas, the said company did, on the 13th day of "September, 1890, enter into a contract in writing bearing "date on that day, with S. D. Andrews and W. H. Whit-"comb, both of Norway, Maine, a true and correct copy of "which said contract is hereto attached, marked 'Exhibit "A' and made a part hereof; and

"Whereas, the said company had not sufficient money "or credit with which to erect, construct and fully equip "the system of water-works contemplated in and by said "ordinance, in such a manner as to comply with the terms "and requirements of said ordinance.

"Now, therefore, this Agreement witnesseth:

"That the said Garland, party of the first part, hereto, "in consideration of the promises, covenants and agreements "hereinafter contained, to be kept and performed by said "company, party of the second part, hereto, does hereby "release and forever discharge the said company, its suc-"cessors and assigns, from all claims, rights or demands "based upon the understanding aforesaid, which now ex-"ists in his favor against said company for services rendered "and expenses incurred by him, and for any other thing in "the matter of securing to said company the franchises, "privileges and immunities set forth and granted in the or-"dinance hereinbefore referred to, and for the same con-"sideration, the said Garland, party of the first hereto, does "hereby promise, covenant and agree to and with the said "company, party of the second part hereto, its successors and "assigns, that within the time limited therefor, in the ordi-"nance before referred to, he will erect, construct and fully "equip the system of water works mentioned in the said "ordinance, and therein called the 'Original Pipe System,' "and will put the same in condition for immediate use by "said company, and will so erect, construct and equip the "said system of water works, that it shall conform substan-"tially to all the requirements contained in said ordinance, "and so that it will stand all the tests provided for in said "ordinance, and will in all things, so complete said system "so that the said city of Oconto will accept the same as pro-"vided in said ordinance, it being understood that all build-"ings, reservoirs, etc., necessary to said system of water-"works shall be erected and constructed by said Garland "upon such real estate owned or to be purchased by said "company, as shall be convenient or suitable for such pur-"poses; and the said Garland, party of the first part hereto, "for the same consideration, assumes and promises and "agrees to hold the said company harmless and forever free "from any loss or liability which may or might accrue to "said company by reason of its carrying out of the condi-

"tions upon it imposed, and the promises by it made, in said "written contract or agreement hereto attached and marked "'Exhibit A,' in the manner hereinafter agreed to be done "by the company.

"In consideration of the promises and the release, cov- "enants and agreements hereinbefore contained, and in "full payment thereof, and for the work thereby contem- "plated, the said company, party of the second part hereto, "hereby promises and agrees to and with said Garland, "party of the first part hereto, that it will pay the said Gar- "land the sum of One Hundred and Ninety-nine Thousand "dollars ($199,000) in the manner and at the time follow- "ing, to-wit:

"Ninety-nine Thousand Dollars ($99,000) thereof in "such sums and at such times after the due and legal execu- "tion and delivery of this contract by the said Garland, as "the same, or any thereof may be called for by said Garland, "it being understood that, inasmuch as the said Garland has "subscribed for Nine Hundred and Ninety (990) shares of "the capital stock of said company, party of the second "part hereto, and as a matter of convenience to save the cash "payments to said company on said stock subscriptions and "the cash payments by said company to said Garland as "aforesaid, payment of the whole or of any part of said "Ninety-nine Thousand Dollars ($99,000) may be made by "the issue to said Garland of stock in said company at par, "provided that any payments which have been heretofore "made by said Garland to said company on account of said "stock subscription shall be returned to said Garland when- "ever demanded by him.

"One Hundred Thousand Dollars ($100,000) thereof "to be paid in the bonds of this company, in such denom- "inations as said Garland may designate, said bonds to be "dated not earlier than August first, 1890, to be made pay- "able in gold to such Trustee as said Garland may designate, "or bearer, not later than twenty-six years after date, to "bear interest at a rate not to exceed six per cent. per an- "num, payable in gold, semi-annually, principal and inter- "est payable at such place or places as said Garland may in- "dicate, the total issue of said bonds to be One Hundred "and Twenty-five Thousand Dollars ($125,000) in amount, "all of said issue of bonds to be secured by a first mortgage "to the said Trustee covering all the property of said com- "pany, connected with its said system of water-works, in- "cluding a mortgage on and proper assignment to said "Trustee of claims and demands which may accrue against "said city of Oconto for the rental of hydrants as provided "in said ordinance, which said One Hundred Thousand Dol-

"lars ($100,000) of said issue of bonds shall be delivered "by said company to said Garland, all properly certified by "the Trustee of said first mortgage as being part of said "issue of bonds so secured as aforesaid, at any time upon the "request of said Garland after the due and legal execution "and delivery of this contract by the said Garland.

"And, in consideration of the promises, the said com-"pany, party of the second part hereto, does hereby express-"ly promise and agree to and with the said Garland, party "of the first part hereto, that it will, whenever and so often "as thereto requested by said Garland, do and perform any "act or thing whatsoever which is required to be by it done "or performed in its said contract, 'Exhibit A,' all of which "shall be done for the use and benefit of said Garland, so "that he may have and enjoy all the rights which said com-"pany would have under said contract if this agreement had "not been made, and said company does hereby authorize "and empower the said Garland, in its name, but at his own "cost and expense, and as the duly authorized agent of said "company, to adopt such measures and institute such pro-"ceedings as may at any time become necessary to secure "the faithful performance by said Andrews and Whitcomb "of their part of said 'Exhibit A'; it being understood that "said Garland shall substantially carry out and perform "all the promises made by said company in said 'Exhibit A', "and shall at all times be and remain practically in the same "position as said company has heretofore occupied so far as "said contract 'Exhibit A' is concerned.

"In Witness Whereof, said party of the first part has "hereunto set his hand and seal, and said party of the sec-"ond part has caused its corporate seal to be hereunto affixed "and these presents to be signed in its behalf by Charles C. "Garland, its president, and to be attested by F. H. Todd, "its secretary, all done on the day and year first above writ-"ten.

"(Signed Charles C. Garland (Seal)
"Oconto Water Company.
" By (signed) C. C. Garland,
" Its president.
"Attest:
" (Signed) F. H. Todd,
" The Secretary.

A true copy. Attest
" F. H. Todd,
" Secretary Oconto Water Company."

Following the record of this contract was recorded at large the duplicate contract of Sept. 13th, between the company and Andrews & Whitcomb—Exhibit "A," p. 78, Record—and the

receipt of Andrews & Whitcomb of Oct. 22nd—set forth in *Thirty-first* paragraph of this statement—for the shares of stock held by them: *id.*, pp. 27-31.

Thirty-fifth: Following adjournment of this meeting of the stockholders the second meeting of the directors —consisting only of Garland and Todd, Barnes having resigned Aug. 6th (*Eleventh* par. of this statement)—was held, at which the only business done was to formally accept the resignation of Barnes as director and elect N. S. Todd (the holder of ctf. No. 13 for one share of stock) director in his place, and adjourn; *id.* p. 32. The stockholders immediately held their third meeting, ratified the action of the directors in accepting Barnes' resignation and electing his successor and adjourned: *id.*, p. 33. The new board of directors immediately met, all being present. The record of the directors' first meeting was read and approved and the following resolution—having the same preamble as the one adopted by the stockholders at their first meeting that day (Oct. 29th)—set forth in *Thirty-fourth* par. of this statement—adopted to-wit:

> "Now, therefore, Be it resolved, that all of the acts, mat-
> "ters and things, and each thereof, set forth in the foregoing
> "recitals as having been done or performed, either by this
> "company, or by the Board of Directors of this company,
> "or by any officer or agent of this company, or by any per-
> "son or persons in the name, or on behalf of this company,
> "whether such acts, matters or things, or each thereof, were
> "properly and legally authorized before they were so done,
> "and performed or not, or whether any proper record of
> "such acts, matters or things has been entered upon the
> "books of record of this company or not, be and the same
> "and each thereof are hereby adopted, ratified, confirmed
> "and to all intents and purposes made as binding and as
> "effectual as against this company, as if such acts, matters
> "and things, and each thereof, had been in each instance
> "especially authorized by the board of directors of this com-
> "pany; and particularly so far as the foregoing recitals set
> "forth the making of the said contract between this com-
> "pany and the said Andrews and Whitcomb, and the said
> "contract between this company and the said Charles C.
> "Garland, or any act, matter or thing in any way pertain-
> "ing to said contracts, or either of them. It being intend-
> "ed hereby to expressly ratify, adopt and confirm said two
> "contracts and each of them."

The directors then adopted resolutions providing for the issue of the company's twenty-five-year-first-mortgage-gold-bonds, with interest coupons attached, to the amount of $125,000, in denomination of $1,000 each, and, as security for their payment, for the execution of a trust deed to the Minneapolis Trust Company

"upon all the estate or property, real, personal and mixed, "of whatever name or description now owned or which may "hereafter at any time be acquired by this company for "its use in connection with the construction, main- "tenance and operation of its said system of water- "works in said city of Oconto, including all rights, privi- "leges and franchises which have been heretofore, or which "may be hereafter, granted to this company by said city of "Oconto, or by contracts which have been heretofore, or "which may be hereafter made and entered into by and be- "tween this company and said city of Oconto, so far as said "rights, privileges and franchises, or said contracts, relate in "any way to the construction, maintenance or operation of "said system of water-works, or any part thereof, or any ex- "tensions thereof, and including also, all the rights, privi- "leges, franchises, immunities, concessions, easements, con- "tracts taken,such revenues, issues and profits of every name, "nature and description now held, owned or controlled by "this company, or which may be hereafter held, owned or "controlled by this company, in any way connected with "the maintenance and operation of its said system of water- "works, or any extension thereof;" Oconto Water Co.'s Record Book, pp. 34-47. They also adopted another resolution in the following words and figures, to-wit:

"Be it further Resolved: That to further secure the "payment of said interest coupons as and when the same "mature, this company make, execute and deliver to said "Minneapolis Trust Company, as trustee as aforesaid, an "assignment in writing, assigning, transferring and setting "over to said Minneapolis Trust Company, as trustee as "aforesaid, all contracts which have been heretofore, or "which may hereafter be made and entered into by and be- "tween this Company and said City of Oconto for the use "of hydrants by said city, together with all its claims, rights "and demands, which may accrue or exist against said city "at any time during the existence of any part of said bond- "ed debt, for the use of hydrants by said city, under "the ordinance hereinabove referred to, or under any "ordinance or contract therefor which may hereafter be "made and that in said written assignment the said trustee "and its successors in said trust, be duly made, constituted "and appointed the agent of this company to receive and "receipt for the sums of money which may become due and "payable to this company from said city of Oconto for the "use of hydrants as aforesaid, during the existence of any "part of said bonded debt, and in the name of this company, "and as its duly authorized agent, institute such proceedings "and to adopt measures as said trustee may from time to

"time deem necessary to collect from said city any sum of "money so as aforesaid due and payable for hydrant rentals, "and that said trustee be further authorized as agent as "aforesaid, to apply all sums of money so as aforesaid, re- "ceived and collected from said city, in each instance as "follows, to-wit:

"First: To the equal pro rata payment of all interest "on said bonds due, and unpaid at the time of the receipt of "such money:

"Second: To retain sufficient of the balance to make "the payment of the installment of interest then next ma- "turing:

"Third. To the payment to this company of any bal- "ance which may remain." Pp. 47–8, *id.*

They also adopted another resolution in the following words and figures, to-wit:

"Be it further Resolved: That the president of this "company be, and he is hereby authorized and empowered "for and on behalf of this company, and in its name, and "as its act and deed, to enter into and execute all contracts "in writing or otherwise which may be by him deemed "necessary or advisable for the completion of said system "of water-works and for putting the same into successful "operation, and to negotiate and sell the first One Hun- "dred (100) bonds hereinbefore mentioned, to such person "or persons, and on such terms and at such place or places "as he shall deem sufficient therefor, and all contracts "heretofore entered into by said president in connection "with the construction of said water-works and with the "negotiation and sale of said bonds, or any thereof, be and "the same are hereby adopted, ratified and confirmed:" *id.*, p. 49.

They then adjourned: *id.*

The stockholders then immediately held another meeting at which all of the stock was voted as at their first meeting that day (as stated in the *Thirty-third* par. of this statement) at which the only business done was to adjourn after adopting the following resolution:

"Be it resolved, That the resolutions, ten in number, "presented by F. H. Todd at the meeting of the Board of "Directors just now adjourned, being the last meeting of "said Board, this day held, which said resolutions, and "each thereof, relating to the issue of this Company's first "mortgage bonds to the amount of One Hundred Twenty- "five Thousand dollars ($125,000) which said resolutions, "and each thereof, were passed and adopted by an unani- "mous vote of said Board of Directors, be and the same "are hereby adopted, ratified, and confirmed by the stock-

"holders of this company, meaning and intending by this "resolution to give to said resolutions and to each thereof, "the same force and effect to all intents and purposes—as "if the same, and each thereof, had been passed verbatim "et literatim by the stockholders of this company:" *id.*, pp. 50–51.

At the foot of the records so made their correctness is certified to by all the directors in one certificate and by all the persons participating in the stockholders' meetings by another: *id.*, pp. 51–52.

Thirty-sixth: There were no other stockholders' or directors' meetings until January 12th following: Andrews' dep., fol. 240, p. 199, Record, and p. 52, Oconto Water Co.'s Record Book.

Thirty-seventh. The bonds and trust deed for the issue of which provision was made at the directors' and stockholders' meetings of Oct. 29th, were duly executed and the deed delivered and recorded in the Registry of Oconto Co., Wisconsin, Nov. 13th, 1890, and 100 of the bonds certified by the trustee, Minneapolis Trust Co., and delivered to Andrews & Whitcomb a few days after, in compliance with the terms of the Menasha agreement of Sept. 13: See Andrews and Whitcomb's receipt, Exhibit "2" of Garland's dep., pp. 260, 261, which reads as follows:

"KNOW ALL MEN BY THESE PRESENTS, that we, S. "D. Andrews and W. H. Whitcomb, both of Nor- "way, Maine, do hereby acknowledge the receipt this "day from C. C. Garland, of the City of Minneapolis, "Minnesota, of one hundred (100) mortgage bonds of the "Oconto Water Company, bearing date the first day of "August, 1890, and payable to the Minneapolis Trust "Company, or bearer, and issued under and secured by a "deed of trust from said Water Company to said Trust "Company bearing date the first (1st) day of November, "1890, and recorded in the office of the register of deeds "within and for the County of Oconto, in the State of "Wisconsin, on the 13th day of November, 1890, in "volume 52 of deeds, on page 394, etc., said bonds being "numbered one to one hundred, both inclusive, and we do "hereby severally acknowledge that said bonds are "received by us and are held by us as collateral to secure "the payment of any sums of money which may be "advanced by us, or by either of us, to said Garland, or to "the said Oconto Water Company under and by virtue of "the terms of that certain contract between the said com- "pany and ourselves made and entered into in writing "on the 13th day of September, 1890, and that upon the "payment of said moneys which may be so advanced, said "bonds, and each thereof, are to be (delivered) returned

"by us to the said Garland, and we do hereby acknowledge "that we hold said bonds as collateral as aforesaid, and for "no other purpose or purposes whatsoever."

"(Signed) Andrews & Whitcomb (Seal)
" S. D. Andrews (Seal)
" W. H. Whitcomb (Seal)
"In presence of
" A. J. Elkins, as to A. & W.
" Matt S. Wheeler,
" A. S. Kimball, as to W. H. W."

The trust deed recites the resolutions adopted at the directors' and stockholders' meetings of Oct. 29th, authorizing the issue of bonds and a trust deed to the Minneapolis Trust Co. for securing their payment, and followed such recitals with a granting clause in the following words and figures:

"NOW, THEREFORE, THIS INDENTURE WITNESSETH: "That the said OCONTO WATER COMPANY, party of the "first part hereto, pursuant to the terms of the foregoing "resolutions, and under the power and authority aforesaid, "and in consideration of the premises and of the mutual "covenants herein contained and of the sum of one dollar "to it duly paid by the Minneapolis Trust Company, "party of the second part hereto, at or before the ensealing "and delivery of these presents, the receipt whereof by said "party of the first part is hereby acknowledged, and for "the purpose of securing the payment of the principal "and interest of the bonds herein, and in the foregoing "resolutions mentioned, and for the further purposes "herein set forth, has granted, bargained, sold, conveyed, "confirmed, transferred, assigned and set over, and by "these presents does grant, bargain, sell, convey, confirm, "transfer, assign and set over unto the said Minneapolis "Trust Company, party of the second part hereto, and "unto its successor or successors in the trusts herein and "hereby created, and unto their heirs, executors, adminis- "trators and assigns, FOREVER, IN TRUST, and for the uses "and trusts herein and hereby created, all the estate and "property, real, personal and mixed, of whatsoever "name, nature or description, now owned, or "which may hereafter at any time be acquired "by said Water Company, for its use in connection with "the construction, maintenance and operation of its system "of water works in the City of Oconto, in the County of "Oconto and State of Wisconsin, hereinbefore and in the "foregoing resolutions referred to: including all rights, "privileges and franchises which have been heretofore or "which may be hereafter granted the said Water Com- "pany by said City of Oconto or by said State of Wisconsin,

"and including also all contracts (with all claims, rights "and demands thereunder or under any thereof) which "have been heretofore or which may be hereafter made "and entered into by and between said Water Company "and said City of Oconto, so far as said rights, privileges "and franchises or said contracts, or any thereof, relate in "any way either to the construction, maintenance or oper- "ation of said system of water works, or any part thereof, "or any extension or extensions thereof; and including, "also, all the rights, privileges, franchises, immunities, "concessions, easements, contracts, tolls, rents, revenues, "issues and profits, and all the machinery, fixtures, "engines, pumps, reservoirs, mains, pipes, conduits and "appliances, of what name, nature or description soever "the same or any thereof may be, now held, owned or "controlled by said Water Company, or which may be "hereafter held, owned or controlled by said Water Com- "pany and in any way connected with the construction, "maintenance or operation of said system of water works, "or any extension or extensions thereof: together with all "the rights, privileges, hereditaments and appurtenances "thereunto, or to any thereof, belonging or in any wise "appertaining, or therewith usually had and enjoyed, and "the reversions, remainders, rents, issues and profits there- "of and therefrom: To Have And To Hold, the rights, "franchises, privileges, and property, real, personal and "mixed, aforesaid, and each, all and every thereof, with "the appurtenances aforesaid, unto and to the use of said "Minneapolis Trust Company, as Trustee, and unto its "successor or successors in trust, their heirs and assigns "Forever.

"In Trust, Nevertheless, for the persons, corporations, "firms and partnerships, and for the equal pro rata bene- "fit and security of the persons, corporations, firms and "partnerships, their legal representatives and assigns, "who shall be or become the holders of such as may be "issued by said Water Company, of those certain bonds "and interests coupons mentioned and described in the "foregoing resolutions and hereinafter more particularly "referred to, or any or either of them, and for enforcing "the payment thereof when due, in accordance with the "true meaning and intent thereof, and of this instrument, "and without preference to any one of said bonds over "any of the others, because of priority in the time of issue, "of negotiation thereof, or otherwise howsoever, and for "the further trusts, uses, intents and purposes hereinafter "set forth."

When the bonds were delivered to Andrews & Whitcomb,

the Water Company had fully performed all its obligations under the Menasha agreement relating to the securities to be given Andrews & Whitcomb for the re-payment of the $40,000 loan and it had no matured unpaid debts, was a going concern *and no act of insolvency had been committed.*

Thirty-eighth: Andrews & Whitcomb completed their loan to the Company in December, the last installment of $5,000 being advanced and the Company's note given therefor Dec. 22nd, the notes given, not previously mentioned, being Exhibits "T" "U" "V" and "W," pp. 503, 504, Record.

Thirty-ninth: After this and on Dec. 29th the claim of the interveners, Dickinson Bros. & King, for cement and sacks, amounting to $528.23, of which $186.60 was paid, and on Jan'y 10th following, the claim of the interveners, Cook & Hyde, for the engine foundation stone, amounting to $85, arose: See intervening petitions, pp. 112, 113, Record. These complete the list of unpaid creditors of the Company.

Fortieth: When the agreement between Andrews & Whitcomb and the Water Company was made Sept. 13th, it was arranged that the money should go through Todd, the Co.'s treasurer, at Oconto, and the first advancements went there. Garland afterwards wanted it to go through his hands at Minneapolis. This made Andrews & Whitcomb suspicious that something was wrong and took Andrews to Oconto, where he arrived Oct. 15th or 16th. The pipe laying was going on when he got there and he commenced the same day trying to find out what was being done with the funds. He tried to learn from the book-keeper and Todd if the bills were being paid and what disposition was being made of the funds, but could get no satisfaction whatever, for they would not produce the accounts or give him any information. He pressed the matter and they finally told him they had instructions from Garland not to let him see the books and he was unable to get an inspection of them or find out anything with regard to the use of the funds. Garland came while Andrews was there and wanted Andrews, who was experienced, to take employment with the company to see to the laying of the pipe, take the measurements, locate supplies and see that the trenches were dug the proper depth, and that kind of work, and Andrews, in the expectation of being able, if he did so, to find out what was being done with the funds, took the offered employment at $100 per month and remained in it until the pipe laying in the streets was finished—Dec. 12th following. In the meantime he continued his efforts to obtain the information he went there to obtain, but accomplished nothing, for he was not allowed to investigate or examine the books. Some time in December, just before the setting of the hydrants was finished, it first came to his knowledge, by Mr. Overholt—complainant's chairman—

coming there, that the company was not paying for the material it was putting into the plant. Overholt told him: Andrews' dep., Q. 89, et seq., fols. 695-6-7-8-9, pp. 443-446, and Q. 101, et seq., fols. 624-5-6, pp. 462-464, Record.

Forty-first: Andrews remained in Oconto until the funds furnished by Andrews & Whitcomb were exhausted, at which time the plant had been carried so far towards completion that the mains were all laid in the streets, the main well was dug and the pumping station nearly completed; *id.* fol. 602, p. 448, Record.

Forty-second: It was supposed while the negotiations were going on at Menasha for the $40,000 loan that the Company's bonds—to be held by Andrews & Whitcomb as security—could be marketed by the time these funds should be expended in construction cost and that Andrews & Whitcomb could be paid and the plant completed out of the proceeds of their sale—last clause of Ex. "D," p. 92; Sturtevants' dep., Q. Q. 8 et seq., p. 429; Andrew's dep., Q. Q. 118, et seq., 446, and Q. Q. 128–132, fols. 627–629, pp. 464, 465, Record—and between Sept. 13th and Jan. 1st following, efforts were made by Andrews and Sturtevant to find a purchaser for the bonds, but none could be found because the plant was not completed: Andrews' dep., Q. Q. 122 et seq., p. 446; Garland's dep., fols. 328–9, p. 269, Record.

Forty-third: Learning from Andrews the state of the company's affairs in December—funds about exhausted, material not paid for and plant unfinished—Mr. Whitcomb came on from Maine to Oconto some time between the 15th and 20th of that month and from there went immediately to Minneapolis where the matter was talked over between Garland, Todd and himself. Garland claimed to be negotiating with some parties for, and thought he would be able to raise the necessary funds to carry on the work. Whitcomb there found out that the stock book did not show Andrews & Whitcomb's true relations to the stock held by them as collateral security and Mr. Todd then wrote the words, "This stock is owned by C. C. Garland and issued to Andrews & Whitcomb merely as collateral. F. H. Todd, Sec'y.," upon the stubs of ctfs. 7, 8 and 9—each for 300 shares—and the words "90 shares of this stock is owned by C. C. Garland and 7 shares is owned by F. H. Todd and issued to Andrews & Whitcomb merely as collateral. F. H. Todd, Sec'y.," upon the stub of ctf. 10—for 97 shares: Whitcomb's dep., Q. Q. 32 et seq., pp. 479, 480; Todd's dep., Q. Q. 56 et seq., pp. 614, 615, Record. Up to this time, however, no debt had been contracted or new transaction engaged in by the Water Company *after* the stock ctfs. Nos. 7, 8, 9 and 10 were issued to Andrews & Whitcomb Oct. 18th, and it cannot therefore be claimed by any creditor of the Company that credit

was given *on the faith of the showing* by the stubs of those ctfs. in the stock book (the only stock-record kept by the Company except such entries as appear in the Books showing the corporate proceedings, Ex. 14 of Andrews' dep.—Garland's dep., fol. 327, p. 268, Record) that Andrews & Whitcomb held as *stockholders* instead of *pledgees* of the Company.

Forty-fourth: Construction work continued after Whitcomb's trip to Minneapolis, under Garland's management until January 12th, following, when the work threatened to come to a standstill for want of funds. The $40,000 loaned by Andrews & Whitcomb had been about all expended, material was not paid for, the works were unfinished and needed, in Garland's opinion, something like $10,000 more to complete them and he had been unable to obtain more funds for that purpose, the bonds could not be sold and Andrews & Whitcomb refused to furnish more funds while Garland remained president of the Company: Garland's dep., pp. 290, 291, Record. In this emergency the parties—Garland, Todd, Andrews and Whitcomb—met in Oconto early in January. What took place there can be best understood by Whitcomb's account of it as follows:—fols. 653–4. pp. 481–2, Record—

"Q. 47. After meeting Garland and Todd in Minneapolis on the occasion you refer to, did you subsequently meet them in Oconto?

A. I did.

Q. 48. How soon after the meeting in Minneapolis?

A. Early in January following, I think.

Q. 49. What took place at Oconto between Andrews and Whitcomb and the Oconto Water Company represented by its officers, Garland and Todd?

A. Mr. Garland came to Oconto and the situation was talked over.

Q. 50. Was Mr. Todd there?

A. Mr. Tood was there.

Q. 51. Was Mr. Sturtevant there?

A. Mr. Sturtevant was not there when I arrived.

Q. 52. Did Mr. Garland and Mr. Todd confess their inability to raise any funds to go on with the work?

A. Well, we expressed ourselves as being very much dissatisfied with the way the business had been managed, and we could not furnish any more funds even if we had them to furnish under any such management, and it resulted in Mr. Garland's sending for Mr. Sturtevant.

Q 53. Do you remember whether Andrews and Whitcomb joined in a request with Garland and Todd to have Mr. Sturtevant come on?

A. I think he did.

Q. 54. Why was Mr. Sturtevant selected?

A. Well, Mr. Sturtevant was a practical man, and was a friend of Mr. Garland's and acquainted with us, and is a man that was competent to construct works and manage them in an economical manner. Well, I will simply say that, from all the evidence we had there, Mr. Garland and the then present management was decidedly incompetent.

Q. 55. What took place after Mr. Sturtevant got there?

A. I presume we talked the situation over, and it resulted in Mr. Garland's making an assignment of his interests to Geo. W. Sturtevant, Jr.

Q. 56. Was there any agreement or understanding of any kind, at that or at any time, between Andrews & Whitcomb and Mr. Garland that Andrews & Whitcomb would relinquish or release Mr. Garland, or protect him in any way from any liability of Mr. Garland to Oconto Water Company?

(Objected to as leading.)

A. None, whatever.

Q. 57. What agreement was there, if any, with regard to any relinquishment by Andrews & Whitcomb of Garland from any liability of Garland?

A. We considered Garland entirely worthless, and relieved him from his endorsement on the notes held by us of the Oconto Water Company, of his personal endorsement.

Q. 58. What reason did you have for considering Mr. Garland worthless, financially?

A. The entire situation; his own confessions.

Q. 59. What were his confessions.

A. That he was unable to procure any money, and had no means to procure it with."

Garland's account—examined as complainant's witness—of the matter is as follows:—pp. 263-4-5-6—

Q. When did you cease to be a director and the president of the Water Company? I call your attention to the records of the company.

A. On January 12, 1891.

Q. Did you at that time have a meeting with Messrs. Andrews & Whitcomb at Oconto?

A. I did.

Q. What was the purpose of that meeting?

A. To transfer my interest in the Oconto Water Company.

Q. Did you at that time enter into any arrangement or agreement with them with respect to the transfer of your interest?

A. I did.

Q. You may please state what that agreement was.

Mr. Webster: Was any part of it in writing?

A. To Mr. W. I think not.

Q. There were some papers signed, were there not, after the agreement was made?

A. There were.

Mr. Webster: Was the transfer of your interest in the company in writing?

A. My interest was transferred in writing by the transfer of the stock.

Q. The agreement that you made was not in writing?

A. The agreement itself was not in writing.

Q. You may please state what it was.

A. In consideration of transferring my interest in the Oconto Water Company and resigning as director and president, Messrs. Andrews and Whitcomb were to relinquish me from my endorsement of the liability on $40,000 notes of the Oconto Water Company, and at that time, did so relinquish me in writing. They also agreed that the Oconto Water Company was to relinquish me from all liability.

Q. From all your liability to the Oconto Water Company?

A. All my liability to the Oconto Water Company.

Q. Please state whether, or not, that relinquishment has subsequently been made in writing?

A. It has not been.

Q. State whether or not there was an agreement that it should be reduced to writing?

A. It was to have been, and my understanding of the matter was, that Mr. Webster, the attorney of the Oconto Water Company, and Andrews and Whitcomb, were to prepare the papers and forward them after being executed to Mr. A. C. Cobb, of Minneapolis, who was at that time my attorney.

Q. That you have not received?

A. That I have not received.

Q. Please produce the writing which you have said was given you as a release from the notes of the Oconto Water Company.

Release produced, marked "Exhibit 4, for identification A. M. C.," and reads as follows, it being stipulated that a copy of the same may be used upon the trial with like effect as though the original were produced:

"Oconto, Wis., January 12, 1891.

"For value received, we do hereby promise and agree to and with Charles C. Garland of Minneapolis, State of Minnesota, that we will protect said Garland and forever hold him harmless from any loss or damage by reason of his endorsement, or making, of any of the promissory notes held by us, or by the Norway National Bank of Norway, State of Maine, whenever the name of said Garland appears either as maker or endorser, whether such liability accrues

against said Garland personally, or as a former stockholder in said company, to-wit: Oconto Water Company.

'In Witness Whereof, we have hereunto set our hands and seals this 12th day of January, 1891.

(Signed)

In presence of	S. D. Andrews.	(Seal)
F. F. Wheeler,	W. H. Whitcomb	(Seal)
A. C. Cobb.	Andrews & Whitcomb.	(Seal)'

* * * * * * * * *

Q. State whether or not, as a part consideration for that transfer this check of $20,000 which has been produced here was to be by the treasurer, Mr. Todd, to you.

A. I am unable to state whether it was a part of the consideration; it was done at that time and with their consent.

Q. With whose consent?

A. The consent of Andrews & Whitcomb.

Q. State whether or not, at that time, Mr. Todd delivered up to you this check of $20,000?

A. He did.

Q. Is the paper I now show you marked "Exhibit '15' J. P. Rep." a paper which you signed at that time, transferring your stock?

It is hereby stipulated that a copy of such assignment is attached to the deposition of S. D. Andrews taken in this action and filed herein as Exhibit "15" and that such copy may be used with like force and effect upon the trial as though the original were produced.

A. I think it is.

Q. In whose handwriting is that original paper which you signed?

A. In Mr. W. H. Webster's, of Oconto.

Witness desires to correct his testimony in the following respect:

In relation to that part of my testimony in which I stated that the check was turned over to Mr. Todd and remained in his hands up to the time I retired as president from the Water Company, I may be mistaken as to my first testimony, as my mind is not quite clear and there is a possibility that the check remained in my hands instead of Mr. Todd, I mean from shortly after it was drawn down to the time of my resignation.

Q. State now what is you best recollection as to where that check remained during that time.

A. My best recollection is that it remained in my possession with the papers of the Oconto Water Company.

* * * * * * * * *

Q. State whether, or not, this assignment, Exhibit "15," was made by you in pursuance of the agreement which you have

testified to making on that day between Messrs. Andrews and Whitcomb and yourself.

A. It was.

Q. State whether, or not, anything was paid to you upon the execution of that assignment, or before, or after, by George W. Sturtevant, Jr., as a consideration of such assignment to him.

A. There was none.

Q. State, please, why assignment was written to George W. Sturtevant, Jr., instead of to Andrews & Whitcomb, and whether that was a matter of agreement as between you and Andrews & Whitcomb.

A. It was a matter of agreement.

Q. State reasons why. What was said?

A. Well; one thing was it would put Andrews & Whitcomb in better position to make a settlement with the other creditors, and to secure time in which to complete the plant; in other words, so far as I was personally concerned I preferred it to be that way, as Mr. Sturtevant, I considered, was a mutual friend of Andrews & Whitcomb and myself, and thought he would see that parties were faily treated so far as the water company was concerned.

Q. Was there any other consideration or reason for this assignment to Sturtevant instead of to Andrews & Whitcomb that you know of?

A. Not to my knowledge.

Q. Were the certificates of stock at that time produced by Andrews & Whitcomb?

A. I don't recall.

Q. Do you remember now of their being produced at the meeting?

A. No, I do not."

And on pp. 290-1, Garland testifies as follows:

"Q. At the time you ceased to be president of the company, had the loan from Andrews & Whitcomb, had that been expended so far as it would go in carrying on the work of constructing the plant?

A. It had.

Q. Was there any money at that time on hand? Had the company at the time you severed your connection with it any money?

A. I think it had.

Q. How much?

A. I could not say.

Q. About how much?

A. I could not say; they may have had two thousand dollars.

Q. Not over two thousand?

A. Well, I think not.

Q. Would that be an unexpended part of this loan from Andrews & Whitcomb?

A. If they had it, it was unexpended.

Q. It was a part of the money furnished them under this contract, was it?

A. Yes, sir.

Q. How near completed were the works at this time—at the time you ceased to be president?

A. If I remember rightly, the pipe laying was all completed with the exception of two river crossings and the completion of the well and setting of the pumping machinery and making connections.

Q. It needed considerable more funds to complete the plant from the condition it was in when you ceased to be president?

A. Yes, sir, it needed money or credit.

Q. To what extent? As you recall it?

A. I should say something like $10,000.

Q. And no arrangement, so far as you know, existed at the time you severed your connection with the company for funds necessary to complete the work?

A. I, at least, had been unable to obtain funds for that purpose up to that date.

Q. Had Andrews and Whitcomb, so far as you know, refused to furnish any more funds for that purpose?

A. I don't know that they had refused; they stated that they were unable to personally furnish more funds as long as I remained in my position as president.

Q. You may state why, Mr. Garland, you severed your connection with the company at that time and why you assigned your stock and turned over your interest in it to George W. Sturtevant, Jr.

A. I severed my connection with the company on the belief that Andrews and Whitcomb by coming into possession of that property and with promises which they claimed to have, that the works could be speedily completed and the creditors paid; and as they claimed it could not be done if I remained in it; they claimed to have parties who would join them towards the completion of the works, but they would have nothing to do with it if I remained connected with it.

Q. At their request, you severed your connection with the company and turned over all the interests you had in it to Geo. W. Sturtevant, Jr.?

A. Yes, sir, at their request and by agreement with them.

Q. And the promise they made to save you from liability?

A. Yes, sir, the promise they made.

Q. The work had practically ceased, had it not, at the time you severed your connection, and could not go on without arrangements being made for needed funds to complete it?

A. I don't think any work had ceased at that time, but it would have had to cease, if funds had not been forthcoming.

Q. If arrangements could not be made for further funds than those which existed at that time, the work would have to come to a dead stop, would it not?

A. Yes, sir."

Andrews' account of the matter is as follows—pp. 449-50:

"Q. 153. Well, when the company's funds were exhausted, was the company able to go on with the work and complete its plant?

A. They were not.

Q. 154. How do you know they were not?

A. They had no funds to go on with.

Q. 155. How did you ascertain that?

A. From bills being presented and no money to pay them with—that was one way.

Q. 156. What, if anything, was said by Garland or Todd with reference to that fact to you—Mr. Garland was then president, and Mr. Todd secretary of the company?

A. Yes, sir.

Q. 157. What did they say with reference to the ability of the company to go on with the work?

A. They said they could not go on.

Q. 158. Did they say why?

A. Lack of funds; they could not negotiate the bonds.

Q. 159. Well, you say this resulted in the reorganization of the company?

A. Yes, sir.

Q. 160. Now, what steps were first taken to bring about a reorganization of the company, and why was the reorganization of the company made necessary?

A. That more funds could be procured to go on with the work; it could not be procured under the management of Mr. Garland and Mr. Todd of the company.

Q. 161. Was that brought to his attention?

A. Yes, sir.

Q. 162. By whom?

A. Andrews and Whitcomb refused to advance more funds.

Q. 163. What steps were taken towards reorganization of the company?

A. Mr. Garland or Mr. Todd sent for Mr. Sturtevant at Chicago to come up and see what could be done in reorganizing the company or going on with the work. Mr. Sturtevant refused to come unless it was jointly agreed between Andrews and Whitcomb and Todd and Garland that it was mutual—that he should come to help out in the trouble.

Judge Noyes: Are you stating the contents of a letter?

(Witness makes no reply.)

Q. 154. Did Andrews and Whitcomb then join with Garland and Todd in a request to come to Oconto, to Mr. Sturtevant, and assist in the reorganization or to do what could be done to continue the work and adjust the trouble; what is the fact?

A. He did come.

Q. 165. Were you there when he got there?

A. I was.

Q. 166. Was Mr. Whitcomb there when he got there?

A. He was.

Q. 167. Well, what was done when Mr. Sturtevant got there in the way of bringing about a reorganization of the company?

A. A reorganization was brought about and Mr. Garland turned over his interest to Mr. Sturtevant, as I understand it.

Q. 168. Well, what was that done for and why was it turned over to Mr. Sturtevant?

A. It was done in the interest of all the creditors and to carry forward the completion of the works.

Q. 169. Why was Mr. Sturtevant called into the company —for what purpose?

A. He was a mutual friend of all of the parties and an experienced man in water works.

Q. 170. Did Mr. Garland resign as president of the company?

A. He did.

Q. 171. And who then was made president of the company?

A. Mr. Sturtevant."

Sturtevant's account is that, until the reorganization proceedings, he had no personal interest in the matter: that the latter part of December he had some correspondence with Todd that resulted in his going to Oconto early in January at the request and on the receipt of a joint dispatch from Garland and Todd and Andrews and Whitcomb, and became president of the company: Sturtevant's dep., fols. 518-519, pp. 395-6, Record.

He further testifies as follows—pp. 399, 400, Record—

"Q. 120. Now, Mr. Sturtevant, you may state what the object was in bringing about the resignation of Mr. Garland as president of that company, and the election of yourself to that office, and how it was brought about?

Judge Noyes: State was said and done.

A. I arrived in Oconto—

Q. 121. At about what date?

A. Early in January, 1891; Mr. Todd and myself went over the books of the company; made a list of the debts of the company; also made an estimate of the amount of money required

to complete the works, and reported the result of our investigation to Garland and his attorney, and Andrews & Whitcomb and their attorney. It was found that more money was needed to complete the works and buy pumps than any one had thought up to that time. Even Mr. Todd, who had made the estimates and plans of the work and been in charge of the construction as engineer for the company, was surprised when he learned the amount that would be required to complete the work. After this—the financial condition of the company had been given to all parties—

Q. 122. Well, what parties?

A. Andrews and Whitcomb, and Garland and Todd, and the attorneys, and other directors of the company, whose names I do not remember now, it was finally agreed that Mr. Garland should cease to be the president of the company.

Q. 123. Well, for what reason, what reason was stated, and what reason controlled the matter?

A. Messrs. Andrews and Whitcomb, after they had learned that a considerable amount of money would be required to complete the works, and that they might be required to furnish some of that money, they refused to advance any further sums or make any agreement to advance further funds, while Mr. Garland remained as president and manager of the company.

Q. 124. Well, state what was said upon that subject, as to why they refused to do it while he was president of the company?

A. As I recollect a reason stated was because of his extravagance and wasteful management of the funds up to that date.

Q. 125. Up to that date?

A. Yes, sir.

Q. 126. And was that the reason stated, and the reason that controlled the change in the officials of that company at that time?

A. As I recollect, that was the reason.

Q. 127. What is your recollection of the fact as to whether Andrews & Whitcomb had completed their advances under their contract with the Water Company of September 13, 1890?

A. I believe they had.

Q. 128. Can you state now what amount of money was found it was then considered necessary in addition to the money that had been expended to complete that system of water works?

A. I can't state positively.

Q. 129. What is your best recollection?

A. My recollection is that in addition to the outstanding bills for material and labor, and in addition to the sum then owed to Andrews and Whitcomb for moneys advanced, the esti-

mate was for about either seventeen or twenty-three thousand dollars to complete the works."

Forty-fourth: The reorganization was consummated at Oconto Jan'y 12, 1891, and consisted

1st: Of the execution by Garland of a written transfer to Sturtevant of *his interest* in the stock then held by Andrews & Whitcomb as collateral, in the following words and figures: Exhibit "15" of Andrews' deposition, p. 246, Record—

"Oconto, January 12, 1891.

KNOW ALL MEN BY THESE PRESENTS, That I, C. C. Garland, of Minneapolis, Minnesota, being the true owner of the following certificates of stock of the Oconto Water Company, a corporation of Wisconsin, viz.: Certificate No. seven (7) for 300 shares; certificate No. eight (8) for 300 shares; certificate No. 9 for 300 shares; and certificate No. 97 for 10 shares, seven of the latter, however, being the property of F. H. Todd, all, however, being now pledged to and held by Andrews & Whitcomb of Norway, Maine, as collateral security, do hereby, for value received, sell, assign, transfer and set over unto George W. Sturtevant, Jr., of Bushnell, Illinois, all of my right, title and interest in and to all the said certificates of stock, and do hereby constitute and appoint the said George W. Sturtevant, Jr., my true and lawful attorney irrevocably for me and in my name and stead, but to his own use, to make and execute all necessary acts of assignment and transfer of said stock on the books of the said company, and attorneys, one or more, to substitute, with full power, for the purposes aforesaid, hereby satisfying, ratifying and confirming all that said attorney or his substitute or substitutes shall lawfully do by virtue hereof.

IN WITNESS WHEREOF, I, C. C. Garland, have hereunto set my hand and seal this 12th day of January, 1891.

(Signed) C. C. Garland. (Seal)

Signed, sealed and delivered in presence of

A. C. Cobb,

F. H. Todd":

2nd: The written promise of indemnity to Garland by Andrews & Whitcomb from loss or damage by reason of any liability *on the notes given them for the $40,000 loan*—quoted in last preceding par. of this statement.

3rd: The assignment by Wheeler, Elkins and N. S. Todd—the holders of the three ctfs. of one share each, left in Wisconsin by Andrews & Whitcomb to keep up the corporate organization—to S. W. Ford, W. H. Whitcomb and S. D. Andrews, respectively.

4th: The holding of a stockholders' meeting at which the entire capital stock was represented as follows:

By Geo. W. Sturtevant, Jr.,	990 shares
" F. H. Todd	7 "
" S. W. Ford	1 share
" W. H. Whitcomb	1 "
" S. D. Andrews	1 "
Total	1,000 shares.

At this meeting the resignations of Garland, as president and director; of F. H. Todd, as secretary and treasurer, and of N. S. Todd, as director of the company, were presented and accepted and Sturtevant and Ford elected as directors in the place of the retiring directors. No other business was done; pp. 52-3-4 and 5, Oconto Water Co.'s Record Book.

5th. The holding of a directors' meeting by the new board, Sturtevant, F. H. Todd (who as director had not resigned) and Ford, at which the only business done consisted of the election of Sturtevant as president and Andrews as secretary and treasurer of the company; *id.* pp. 57-8.

No other stockholders' or directors' meeting was held until March 6, 1891; *id.* p. 59.

It is important in this connection to bear in mind that the *proof* shows that Sturtevant's entry into the company as above stated was *not* as the friend or representative of *one* of the factions then at discord—one, Garland and Todd, the other, Andrews and Whitcomb—but because of his mutually known fitness and integrity, as the suggestion and choice of Garland and Todd, assented to by Andrews and Whitcomb. He paid nothing for Garland's transfer to him of the former's equity in the involved stock, as he came into the concern not for profit but only upon the joint solicitation of the factions (and, without doubt, with the lively desire natural under the circumstances —since through him, primarily, Andrews and Whitcomb were in the trouble—to do all he could in good conscience to save them from from loss, but realizing, as his subsequent conduct shows, that the surest means to that end was to follow a perfectly candid and honest course with every creditor) to bring, if possible, order out of the chaotic state Garland's management had thrown it into, and for that purpose—entering it as he did, in a legal sense, solely as the assignee of Garland's equity as a subscriber to 990 shares of the capital stock—he thereby became subrogated to the privileges and obligations of Garland under the subscription contract and, when in, stood only in Garland's shoes. Nevertheless, and because Andrews & Whitcomb released Garland (who was utterly worthless) upon his retirement from the company from liability on the company's notes held by them for the $40,000 loan, and because Ford paid nothing for the share of stock assigned to him by Elkins, it

pleased the Circuit Judge to say in his opinion—p 715, Record—

> "Neither Sturtevant nor Ford paid any consideration for "the stock. They were mere dummies in the enterprise, "acting in the interest of Andrews & Whitcomb, and the "transfer was made to give the latter full control of the "management of the corporation which they thereafter "exercised. By this transaction Andrews & Whitcomb "became the absolute owners of the stock, etc."

Forty-fifth: The reorganization being consummated, Sturtevant at once justified the opinion which led Garland to solicit his entry into and management of the company, viz: that "he would see that parties were fairly treated so far as the Water Company was concerned"—fol. 326, p. 267, Record—by going at once to Milwaukee and interviewing complainant's counsel, Judge Noyes, the next day—Jan'y 13th—which resulted in a message being wired at once by their counsel to complainant to meet creditors in Chicago some day following. He—Sturtevant—then went to Chicago and saw the interveners R. D. Wood & Co. and Chapman Valve M'f'g Co., and arranged for a meeting of creditors at the Brevoort House in that city the next day—the 14th—at which complainant was represented by Mr. Overholt, Mr. Miles and counsel, Mr. Miller, of Miller, Noyes & Miller, Milwaukee, its solicitors herein: the intervener R. D. Wood & Co. by Mr. Printice, their Chicago agent; the intervener Chapman Valve M'f'g Co. by Mr. Buss, its Chicago agent, and Andrews & Whitcomb by Mr. Whitcomb. They were in session Jan'y 14th and 15th. At this time there remained only the balance of the month—16 days—in which to complete the water works "to successful operation" by reason of Section VI of the City Ordinance granting the franchise, which reads as follows: p. 83, Record—

"Section VI.

> The grantee, its successors or assigns, shall, within twenty days from the acceptance hereof, commence in good faith the construction thereof, and have the same completed to successful operation on or before February 1, 1891; provided the grantee, its successors or assigns, is granted the right before July 15, 1890. Any delay, however, caused by the elements, malicious interference, inability to obtain material or order of court shall work an extension of time for the loss so occasioned."

Sturtevant in his deposition of Oct. 5, 1894, testifies as to what took place at this meeting of creditors, as follows: pp. 400-1.

Q. 130. Now I wish you to state what took place at the

meeting of creditors there at the Brevoort House, in Chicago, on the 14th and 15th of January, 1891?

A. A statement was made to the creditors—

Q. 131. By whom, if you remember?

A. I think by myself. A statement was made of the financial condition of the company and of the amounts owed by the company, and of the estimate of the amount of money required to complete the works.

Q. 135. Before going any further, I will ask you this question: At whose suggestion or request was this meeting of the creditors brought about?

A. I think it was my own.

Q. 133. What had Andrews & Whitcomb to do with it—with bringing about that meeting—with giving the notice or arranging for the meeting of the creditors?

A. I think they agreed to be present at that meeting, and I notified the other creditors.

Q. 134. What is the fact of this having been done on their suggestion and request—Andrews & Whitcomb?

A. Well, it may have been at their suggestion that the creditors were gotten together.

Q. 135. Is it not a fact that when Andrews & Whitcomb found out, on the 12th of January, the financial condition of the Oconto Water Company, and with the view of coming to some arrangement with the other creditors, that Garland's resignation was brought about in order that there might be a meeting of the Oconto Water Company's creditors, with a view of coming to some arrangement for the payment of the debts and the completion of the plant?

(Objected to as leading.)

Q. 136. Was not all of this brought about upon their suggestion and request?

(Same objection.)

A. Yes, sir.

Q. 137. Well, now you state what took place at this meeting—what creditors were present—what propositions were made, and what was said and done, and by whom?

A. I think Mr. Whitcomb, after the statement of the financial conditon of the company was explained to the creditors, Mr. Whitcomb asked if the creditors would join them, Andrews & Whitcomb, in advancing money sufficient to complete the works, and I think he asked them if they would—he did ask them if they would advance moneys in proportion to their claims against the company.

Q. 138. State what was further said in connection with such request, upon what terms?

A. Mr. Whitcomb asked if the creditors would advance the money in proportion to their claims and on completion of the

works take proportionately of the bonds and stock of the company in payment with themselves.

Q. 140. What, if anything, was said by Mr. Whitcomb in case such an arrangement would be consented to about there being any priorities of lien or interest in favor of any of the parties themselves?

A. As I remember, Mr. Miller, representing the National Foundry and Pipe people, thought their claim was a prior claim, and that Mr. Whitcomb thought their claim for moneys advanced was a prior claim, but I believe Mr. Whitcomb suggested that so far as he was concerned, priority—

Q. 141. He, or Andrews and Whitcomb?

A. Andrews and Whitcomb suggested that the matter of priority so far as they were concerned, would be waived if the other parties would join them in furnishing money to complete the works, and if the Water Company would consent to it or agree to it, that all the parties joining to complete the work should share the stock and bonds of the company, in proportion to their claims, to the whole amount that each had in.

Q. 142. Was that proposition made to all creditors present on the part of Andrews and Whitcomb?

A. Yes, sir.

Q. 143. What reply did the creditors or any of them make to that proposition?

A. That suggestion or method was declined by Mr. Overholt and Mr. Miles.

Q. 144. They represented the National Foundry and Pipe Works?

A. Yes, sir.

Q. 145. How was it treated by the representative of R. D. Wood & Co.?

A. He remained non-committal. He did agree to correspond or advise with the firm of R. D. Wood & Co. and get their decision as to what they would do.

Q. 146. Did he have anything to say with reference to being guided by the action of the National Foundry and Pipe Works people as to whether they would accept that propositon?

A. I do not recollect.

Q. 147. Did he or did he not express his consent or assent to the proposition?

A. He did not agree to recommend it to his people—only to report it to them.

Q. 148. Well, did you ever have from his people any assent or consent or any further action with reference to that proposition—from R. D. Wood & Co.?

A. Afterwards Mr. Prentice, representing R. D. Wood & Co., advised me that his people would not consent to that arrangement, but in the meantime, they had filed a lien, I think.

Q. 149. Well, what other propositions were made by Mr. Whitcomb at that meeting of the creditors than the one you have just disclosed?

A. Well, Mr. Whitcomb asked the creditors who were present—I think Mr. Buss and the representatives of the National Foundry and Pipe Works, Messrs. Overholt and Miles—that after those parties had declined to advance any money for the completion of the works, Mr. Whitcomb asked them if they would take pay in the bonds of the company provided an arrangement would be made by them, Andrews and Whitcomb, to secure money enough to complete the works.

Q. 150. What was their reply to that proposition?

A. They declined.

Q. 151. Did Mr. Whitcomb make the proposition to pay them in bonds, or did he asked them if they would take bonds?

A. My recollection is that he asked them if they would take bonds provided an arrangement could be made for the completion of the works.

Q. 152. Well, was there any other propositon?

A. I think there was one other.

Q. You may state what it was.

A. As I recollect, Mr. Whitcomb asked if the creditors would—after the creditors had declined to advance money, if they would accept in payment for their claims bonds of the company in proportion to their claims, and some stock of the company if money was obtained from other sources for the completion of the works. I think those were all the propositions made.

Q. 154. What did the other creditors do with reference to the other proposition made by Mr. Whitcomb than the one to join them in the completion of the plant?

A. They declined to accept them.

Q. 155. State what the representatives of the National Foundry and Pipe Works said—upon what terms they would settle their claim?

A. They offered to settle for face value.

Q. 156. Was there any suggestion made or question asked if they would settle for 80 cents on the dollar?

A. That was one.

Q. 157. Was it accepted?

A. The National Pipe Works people declined this proposition, Mr. Buss, speaking for the Chapman Valve, agreed to accept it; Mr. Prentice, speaking for R. D. Wood & Co., I think, declined to accept it.

Q. 158. Well, were the parties there able to come to any adjustment or terms of settlement of the indebtedness of the Oconto Water Company?

A. No.

Q. 159. State what the fact is with reference to whether the Oconto Water Company was ready and willing to carry out any one of these propositions proposed by Mr. Whitcomb to these creditors in case it had been accepted by them—whether they were ready and willing to do their necessary part to carry out any one of these propositions that might have been accepted?

A. I think they were.

Q. 160. What is the fact?

A. The fact is that the company would have turned over its stock and bonds in payment of those claims if the creditors would have accepted them. They were not able to pay 80 cents on the dollar to any creditors if that proposition had been accepted.

Q. 161. I mean what would the company have done, so far as it could have done to carry out the propositions made by Mr. Whitcomb?

A. In my relation to the company as president and holder of the majority of the stock—

Q. 162. At that time you held 997 shares of the stock of the company?

A. I think I did.

Q. 163. That was your object in accompanying Andrews and Whitcomb to this meeting of the Oconto Water Company?

A. Yes, sir. You asked if I represented the stock of the company. The stock was then held by Andrews & Whitcomb as collateral to their loan.

Q. 164. Subject to that pledge you represented that stock?

A. Yes, sir; the parties were able to come to no agreement—

Q. 165. You may state what the fact is, Mr. Sturtevant, as to whether the creditors at that time were informed of the fact that the time for the completion of the plant would soon expire?

A. They were.

Q. 166. Do you remember whether the date of the expiration of the time was expressed to them?

A. Yes, sir.

Q. 167. What, if anything, was said with reference to that fact by the creditors or any of them?

A. Mr. Whitcomb stated that unless steps were taken to complete the works the franchise would be forfeited by the city or by the company.

Q. 168. Do you remember whether any, and if so, what reply was made to that on the part of any of those creditors there represented?

A. I do not think they made reply; they still declined to make any arrangement for completing the work.

Q. 169. Well, then, nothing resulted from those meetings of the creditors—from Andrews and Whitcomb—in the way of any arrangement for obtaining more money from them or pay up their claim?

A. No, sir."

Mr. Whitcomb testified upon the subject as follows: p. 482, Record—

"Q. 62. What personal part did you have or take in the subsequent matter of getting the creditors together, and in the interview that took place with the creditors upon the subject of the Oconto Water Company's indebtedness? You may state the transaction fully.

A. I think Mr. Sturtevant notified the creditors, mainly by letter, of the situation.

Q. 63. Did it result in a meeting of the creditors in Chicago?

A. I think it did.

Q. 64. Can you say about what date that meeting was?

A. Some time about the middle or latter part of January.

Q. 65. How soon after the reorganization of the company when Mr. Sturtevant was elected president?

A. Immediately after.

Q. 66. Was the calling together of these creditors with the knowledge of Andrews and Whitcomb?

A. Yes, I think—yes, after it was suggested.

Q. 67. What creditors did you and Mr. Sturtevant meet in Chicago upon this matter, and what took place?

A. We met Mr. Overholt, also Mr. Miles, representing the National Foundry and Pipe Company; Mr. Prentice, representing R. D. Wood & Co.

Q. 68. Well, state what was said and done, and who was present.

A. Mr. Miller was there as counsel for the National Foundry and Pipe Works people.

Q. 69. The complainant in this case?

A. Yes, sir.

Q. 70. You may state, Mr. Whitcomb, what propositions were made, who made them, and what was done with them.

A. The situation was stated to these people.

Q. 71. You may state what was said to them.

A. Well, the financial conditions and the situation of the company.

Q. State what they were informed.

A. They were informed that the funds of the company were exhausted and the works were in an unfinished condition; that there was a very short time to complete the works in accordance with the ordinance, and that they were unable to do anything further in the matter. Of course the situation, the change in the officers of the company, was made known; facts were given entirely in relation to that, and I made the suggestion during this interview, to the creditors, that there was no other way but for us to join, contribute proportionately, and finish the works.

Q. 73. To which of the creditors was this proposition made by you?

A. It was made to the creditors named as being represented there.

Q. 74. Did you propose that to those creditors as the means which seemed to you to be the only one for finishing that plant?

(Objected to as leading.)

A. It was the only means that we knew of.

Q. My question is, did you propose that as the only means for that purpose, and were Andrews and Whitcomb ready and willing to carry out that proposition so far as it related to them?

A. They would have endeavored to. It was made in good faith. Mr. Prentice, at the first interview, suggested that his people, he thought, would join, and Mr. Buss stated the same, but the pipe people, either Mr. Overholt or Mr. Miles, stated that they were not in the water works business; they had not funds to contribute; in fact, they needed money that was due on the deferred notes to meet the pay-roll, as I understand it, in the conversation, and did not care to consider any proposition of that kind.

Q. 76. Did they decline to join in any enterprise for completing the plant?

A. They did.

Q. 77. What subsequently was done with reference to R. D. Wood & Co.?

A. Mr. Prentice told us that he was in communication with his people and as soon as he heard he would report, and made an engagement to meet us the following afternoon at Hotel Brevoort, but failed to appear, and I have never seen him from that day to this.

Q. 78. Do you know anything about any communication from him to you after this disposition of this proposition?

A. We never laid any communication before him.

Q. 79. Were you able to come to any agreement with the other creditors for completing that plant?

A. We were not. We made a proposition that I would, on my own account, without consulting Mr. Andrews, make a discount of $1,000 on our interest in the company if they would take it from our hands. I did not know whether Mr. Andrews would make the discount, but I was willing to make the discount of $1,000 on my own account to be relieved.

Q. 80. Who was that made to?

A. I think it was made particularly to Mr. Overholt and Mr. Miles. They were the rich creditors.

Q. 81. Well, what was done with that?

A. It was not accepted.

Q. 82. What further proposition was made?

A. I think I asked them if we could succeed in constructing

the works, if they would take their pay in bonds of the Oconto Water Company. They replied that they could not be negotiated and did not care to take them. Of course, in the start, at these interviews, it was understood the company would assent to an arrangement that could be made to suit the creditors as far as releasing any interest they might have in the —

Q. 83. What do you mean—what company?

A. I mean the Oconto Water Company. Of course, we then were holding the stock and bonds in pledge, of course, all of this—

Q. 84. (Interrupting.) Mr. Sturtevant represented the Oconto Water Company there, did he not?

A. He did.

Q. 84. What other propositions did Andrews and Whitcomb make to the creditors in this behalf?

A. I think that covers about all.

Q. 86. Was anything said about the stock of the Oconto Water Company being shared with them?

A. The proposition was that if they joined with us in completing the plant that we would all share or pro rate.

Q. 87. By pro rate,—how do you mean?

A. In proportion to the amount contributed,—when each had contributed. It means that the property of the Oconto Water Company was to be shared in proportion to the amount contributed. The amount contributed was to be contributed thereafter; the amount taken in connection with that they already had contributed and with what they would contribute to complete the plant.

Q. 88. What, if anything, was said by you for Andrews and Whitcomb about waiving your securities in case they would go on and do that?

A. We said we would waive our security if they would do that.

Q. 89. What terms, if any, did they state, any of the creditors, that they would accept and settle their claims?

A. Not any.

Q. 90. Did they say anything about being paid in full for their claims, and if so, what and who said it?

A. Mr. Overholt or Mr. Miles never intimated that they would make a discount whatever,—any proposition—anything in the way of settlement, whatever,—to adjust the matter in any way.

Q. 91. Do you think of anything further that was said and done between the creditors and Andrews and Whitcomb on that occasion than what you have stated?

A. I think that pretty nearly covers all that I recollect now.

Q. 92. Were they informed at that time of the date when

the time would expire for completing the plant under the ordinance?

A. I think they were.

Q. 93. Do you now recollect what that date was?

A. I have an impression it was Feb'y 1st. I know it was very nearly out, but I am not sure about the date.

Q. 94. Was there any considerable portion of the construction work still to be performed before the plant would be completed?

A. There was; quite a good deal.

Q. 95. State what generally.

A. I think there had been very little done to the pumping station; that is, no boilers or machinery had been set; the river crossings had not been completed.

Q. 96. Had a supply of water been obtained—of wholesome water?

A. It had not; the well was not completed.

Q. 97. Were estimates made and considered by yourselves and the other creditors on this occasion as to what it would cost to carry the work to completion?

A. I think Mr. Sturtevant and Mr. Todd had made estimates and they were submitted there.

Q. 98. What resulted from that meeting, Mr. Whitcomb?

A. Do you mean all that subsequently resulted?

Q. 99. In the way of accomplishing its purpose?

A. Nothing was accomplished; I went east, and nothing more at the time was done."

Complainant's officers who were present at the meeting of the creditors—Mr. Overholt, chairman, and Mr. Miles, member of its board of managers—confirm Sturtevant's and Whitcomb's account of the proceedings. Overholt testifies as follows:—p. 354, Record—

> "In January, 1891, about the 14th, I met Messrs. Sturtevant and Whitcomb at Chicago. Mr. Sturtevant said he was president of the Oconto Water Company. As far as I know Mr. Whitcomb was not an officer of that company. Mr. Miles was with me in Chicago.
>
> They wanted us to go in with them and complete the work. They showed us a statement of the amount necessary to complete the works and we were asked to furnish our share of that amount. They did not want to give us stock, but proposed to give us the bonds of the company. They also made us an offer of bonds for our claim. They had our amount down on the list of moneys it would take to complete the works, and we were on the list of creditors and there was no denial of our claim.
>
> Mr. Sturtevant, who represented himself as the president of the company, had the list of creditors in his book,

and Mr. Miller, our attorney, and Mr. Miles copied it. The book was produced by Mr. Sturtevant."

Mr. Miles testifies as follows:—p. 358, Record—

"I was present at the interview in Chicago with Mr. Sturtevant, in January 14 and 15, 1891. I am a stockholder and member of the board of managers of complainant company. I went with Mr. Overholt to see about collecting this claim. There were various propositions suggested. Mr. Whitcomb and Mr. Sturtevant proposed our taking the stock and bonds of the Oconto Water Company in payment of our claim, and for us to subscribe fresh capital to help to complete the works. It was stated by us what the amount of our claim was, and it corresponded with data that Mr. Sturtevant had. The claim was stated against the company and no objection was, at any time, made to the statement. It was not asserted at any time to be against Mr. Garland or Mr. Todd."

No other witnesses were examined upon the subject.

Forty-sixth: The refusal of the other creditors to join with Andrews & Whitcomb to complete the plant or come to any accommodation short of payment of their claims in cash was "the parting of the ways" and each interested party pursued an independent course from that time on and this was the situation: The plant had to be completed "to successful operation" within the next 16 days or the franchise would be liable to forfeiture, and to do this, additional funds, to the estimate amount of at least seventeen thousand dollars, was required, and the company was without a dollar and its bonds could not be sold. The water supply—required by Section II of the Ordinance granting the franchise, p. 82, Record—had not been secured—Sturtevant, Q. Q. 118-119, pp. 398-399, Record—and whether it could be was problematical and every dollar put into the plant until it was secured was at peril of the company's inability to obtain water sufficient "to supply the city and its inhabitants with good and wholesome water suitable for fire and domestic purposes." The pipe, purchased of complainant, had been laid into a nine-mile pipe-line in the streets of the city and the hydrants, purchased of the intervener R. D. Wood & Co., and the valves, of the intervener Chapman Valve M'f'g Co., all set in place and attached thereto. If the work did not go on all might be lost, for without the consent of the city the streets could not again be torn up and this material removed.

Under these conditions it is material to note the course of the various parties.

The complainant, pursuing the notion that it had a lien under the laws of Wisconsin upon the plant, filed its petition for such a lien January 28th and began suit, against Oconto Water Company alone, in the court whose judgment is here under re-

view, to foreclose it, on the 30th; see p. 333, Record, for Bill and recitals.

The interveners R. D. Wood & Co. filed their petition for a lien Jan'y 19th and also commenced suit against the same defendant alone in the same court to foreclose it; see intrvening petition, p. 623, Record.

In neither of these suits was the court asked to take charge of the Water Works enterprise and provide for its completion or preservation but it was left on the hands of the Water Company and to any fate that might befall it; nor were any other parties made defendants in either suit. The Water Company contested the suits, both on the ground that it did not contract and was not liable for the debts sued for and that there was no lien-right in such cases, but the suits went to judgment against the Company for amounts and liens claimed and this court, upon appeal, affirmed the one obtained by complainant. The other one was not appealed from.

In the meantime and at once after the failure of the negotiations with the other creditors, Andrews and Sturtevant began negotiations with the city authorities of Oconto for an extension of the time in which to complete the plant. At this time there were debts due and unpaid from the Water Company *to people living in Oconto* for labor and material done and furnished in construction of the plant—W. K. Smith's dep., pp. 656-658, Record—Andrews' dep., pp. 651-2, Record—and many complaints were being made by these people because they were unable to get their pay and because it was doubtful whether they ever would, it being well known to them that the company's funds were exhausted. This state of affairs led the common council of the city to require, as a condition of granting any extension of time for completing the plant, payment of "the bills for labor performed in said city and for material furnished and all other bills contracted by said Oconto Water Company in said city up to that time that had not been paid." This condition was accepted by Sturtevant on behalf of the Water Company and by Andrews & Whitcomb, who "promised that in case such extension of time was granted" that all such bills would be paid out of any funds that might be arranged for by said company and said Andrews & Whitcomb for carrying on the work of construction. The common council thereupon and on Jan. 17th—two days after the creditors' meeting in Chicago—granted the petition of the company for such an extension to May 1st thereafter; W. K. Smith's dep., supra., and Exhibits "A" and "B," pages 659-660; Andrews' dep., pp. 651-2, and John Noonan's dep., p. 655, Record.

Andrews & Whitcomb thereafter and prior to March 13th following, at the request of the Water Company—recitals in Ex. "G," p. 96, and Andrews' dep. qq. 179-184, p. 451, Record—ad-

vanced money to the Company to pay these bills and continue construction work, as follows:

January 21st	$1,843.17;
February 5th	551.55;
" 18th	1,395.07;
March 11th	700.00;
Total	$4,489.79.

The items for which this money was expended are listed in Exhibit "A," pp. 660-1, Record.

Forty-seventh: March 9th there was a meeting of the stockholders at which the entire stock was represented as follows:

By Geo. W. Sturtevant, Jr	990	shares
" F. H. Todd	7	"
" S. W. Ford	1	"
" W. H. Whitcomb	1	"
" S. D. Andrews (W. H. Webster, proxy)	1	"
Total	1,000	"

At this meeting the only business done was to adjourn after adopting a resolution authorizing and empowering the board of directors to borrow of Andrews and Whitcomb a sum of money not to exceed $20,000, for the purposes of the corporation, and for that purpose to mortgage or pledge the franchises, tolls, revenues and property, both real and personal, of the company as security for the re-payment. The resolution contained the following recital:

> "The said Andrews and Whitcomb having already advanced to this company various sums of money approximating the amount of Forty-five Hundred ($4,500) Dollars in addition to their loan made to the company under their contract of September 13, 1890, with the company, for which they hold no security, all such sums may be considered a part of the new loan hereby authorized to be made of the said Andrews and Whitcomb and secured as above provided for, the same having all been used for the purposes of the company"; pp. 60-1, Record.

The directors held a meeting immediately afterwards at which all the directors—Sturtevant, Ford and Todd—were present and the only business done was to adjourn after adopting the following preamble and resolution:—*id.* pp. 61-2—

> "Whereas, various sums of money in addition to the amount agreed by them to be furnished and furnished the Oconto Water Co. by Andrews and Whitcomb under their contract dated September 13, 1890, with the said company, approximating the sum of Forty-five Hundred ($4,500) Dollars have been furnished the said company by the said

Andrews and Whitcomb, or procured by them to be furnished the said company prior to this date, and

Whereas, more money is needed by the said company to enable it to carry on to completion the work of construction of its plant and to put the same in working order, and the said company having no funds with which to repay the said Andrews and Whitcomb the additional sums above mentioned, so by them advanced as above stated, and the said Andrews and Whitcomb, having no security for the payment of such sums of money, and being willing in consideration of being secured the repayment of such additional sums and interest, to make further advances or loans of money to said company in consideration of being secured the repayment thereof and interest, and the said Andrews and Whitcomb, for such security, being willing to take a second mortgage of the franchise of said company now held by them as collateral to a loan made by them to said company under said contract of Sept. 13, 1890, and a mortgage upon the tolls, revenues and property, both real and personal, of said company, Now, Therefore, be it

Resolved, that a sum of money which, taken with the additional sums already advanced or procured to be advanced by the said Andrews and Whitcomb to the Oconto Water Company, as above stated, shall not exceed the sum of twenty thousand dollars, or so much thereof as they may be willing to loan, be borrowed from the said Andrews and Whitcomb by the said Oconto Water Co. for the period of sixty (60) days from the date of the execution of a contract between said parties therefor, at the annual rate of 7 per cent interest: the company's note or notes to be given as desired by the said Andrews and Whitcomb, to be signed by the president and countersigned by the secretary of the company, payable to the order of Andrews and Whitcomb, and payment thereof to be secured by a second mortgage or assignment of all rights, privileges, immunities, franchises and powers of whatsoever name or nature of the said Oconto Water Company, and a second pledge of the bonds and stock of said company now held in pledge by the said Andrews & Whitcomb as collateral to the loan made by them to said company under the said contract of September 13, 1890, and by a mortgage upon all tolls, revenues and property, both real and personal, of the Oconto Water Co.

The President of the company is hereby authorized to make and sign on behalf of the company contracts and papers necessary to carry into effect and accomplish the purpose of this resolution, and the same, when countersigned by the secretary of this company and sealed with its seal, shall be the contract of this company."

March 12th there was another meeting of the Board of Directors at which the only business done was to accept the resignation of Andrews as secretary of the company and elect Ford his successor and adjourn: *id*, p. 63.

Forty-eighth: March 13th the company contracted with Andrews & Whitcomb—Exhibit "G," p. 96, Record—for a further loan of $12,000 in addition to the amounts advanced by them up to that time *after the first loan was exhausted*, and to secure repayment of these amounts with interest at seven per cent., gave them its notes for the several amounts so advanced—Andrews' dep., q. q. 179-184, p. 451, and q. q. 197-202, pp. 470-1,—and for the $12,000 to be advanced—Exhibits "E," "F," "G" and "H," pp. 505-6, Record—and a further mortgage on and pledge of the same property constituting their security for the $40,000 loan, and further security as follows:

> "Said second party (the Water Co.) also agrees that all other property of every kind, now the property of said second party, not yet a part or attached to its said plant or works, shall be, and the same is hereby vested in and made the property of the said first party, but only as additional security, however, for the re-payment of all advances additional to those made under said contract of Sept. 13, 1890; also that all personal property hereafter purchased by said second party for its plant or works, whether building material, machinery, pumps or other articles needful to its plant to put it in a completed condition and at work, and to keep it so, shall be purchased in the name of and shall be and remain the property of the said first party, but only as additional security, however, for the repayment of all such advances or loans as are above referred to as additional to the loan made under said contract of September 13, 1890; the purpose and object of the above clauses which relate to the personal property of said second party purchased and to be purchased, being (said first party having furnished and advanced the money for the purchase thereof) to save and preserve the same as security for the repayment of the additional advances or loans made and to be made said second by said first party for the purposes of carrying on the construction of said plant and works."

Every dollar of this money was advanced by Andrews & Whitcomb and was used for the purposes set forth in the contract of March 13th—Ex. "G," p. 96, Record—Andrews' dep., qq. 182-3-4, p. 451, Record—and the items for which it was expended are listed in Exhibits "A" and "B," pp. 660-3, Record; Mullen's dep., p. 653, Record.

Forty-ninth: The plant was not completed by the expenditure of the $12,000 advanced by Andrews & Whitcomb under the contract of March 13th, Exhibit "G," p. 96,—Andrews' dep.,

q. 188, p. 451, Record—and on May 16th following a third contract was made between them and the company for still further funds—Exhibit "H," p. 99, Record—under which they advanced the company $8,189 more, which carried the plant to completion so that on September 12th following it was accepted by the city as constructed according to and answering all the calls of the ordinance granting the franchise to the company: Andrews' dep., qq. 189-201, pp. 452-3; q. 204, p. 471, and q. 206, p. 453, Record.

The last contract, Exhibit "H," supra, referred to and incorporated the one of March 13th—Exhibit "G," supra, recited the advances made under it, their insufficiency to complete the plant, the need of further funds for that purpose, the willingness of Andrews & Whitcomb to advance them on stated terms, viz.: 7 per cent. interest and security on the same property constituting their existing securities and contained a clause for other security similar to that in the contract of March 13th, set forth in the last preceding paragraph of this statement.

Fiftieth: Since Andrews & Whitcomb, in order to prevent a forfeiture of the ordinance-franchise and the certain loss in that event of every dollar they had loaned the company up to that time (for the company was without other assets than this franchise and its accretions, their only security) were left by the other creditors to bear the unknown cost, alone, of going forward with the work—and that, too, at peril of not being able to find a sufficient supply of pure and wholesome water—not to repeat the extravagant and wasteful use of money that characterized Garland's management, and to insure "a prompt and economical completion of said plant and works," they made their second and third loan-contracts conditional in this; that they would be obliged to furnish no money under them for any purpose until it should be *mutually* agreed between themselves and the Water Company that such purpose was necessary and advisable for the completion of the plant; last clause of Exhibits "G" and "H," pp. 96-101, Record. As Mr. Andrews had been made treasurer of the company at its reorganization, in order, without doubt, to be in a situation to know thereafter what was done with the funds, he remained in Oconto from that time until the plant was completed and, under the right reserved to Andrews & Whitcomb in that behalf by the new loan-contracts, was in constant co-operation with the other officers of the company in making necessary purchases of material and advancing construction work, disbursing the funds furnished by his firm therefor as treasurer of the Company and, so situated, had more or less to do with negotiations, carried on by correspondence, for the purchase of, and payment for material and other transactions incident to the work, signing the letters as shown in the stipulation in fol. 911, pp. 670-1, Record.

Fifty-first: June 17, 1891, Andrews & Whitcomb began suit in the state court—circuit court of Oconto County—for the foreclosure of their securities—the contracts of September 13th and March 13th, making the Water Company sole defendant. The case went to decree of foreclosure and sale, by default, August 13th, following, under which sale was made September 12th, following, by a referee appointed in the decree for that purpose. At the sale a representative of complainant appeared and, before the sale took place, read the notice, Exhibit "C I," p. 509, Record—Andrews' dep., pp. 453, 454, Record. Andrews & Whitcomb were the only bidders and the property covered by the security-instruments—the stock, bonds and ordinance-franchises—was struck off to them for $64,500, the amount adjudged in the decree to be due them under their first and second loan-contracts for principal, interest and costs, and costs of sale. A referee's deed was given them which the decree provided should, when the sale was confirmed, vest in the purchaser

> "the full legal title of the property so purchased, free and "clear of any and all rights, claims or equity or equities of "redemption of the defendant or of any person or persons "claiming by, through or under said defendant subsequent "to the acquirement by the plaintiffs of their rights, in- "terests and claims under the contracts between them and "the defendant set forth in the complaint, etc."

The sale was reported and confirmed September 29th following: See transcript of record in the suit, pp. 545-600, Record. Andrews & Whitcomb went into immediate possession under the referee's deed of the entire plant which was thereafter held and operated by them and their grantee, Oconto City Water Supply Company, (a corporation organized under a special statute of Wisconsin—hereinafter mentioned—to acquire title to and operate the plant) a little over a year—until October 10, 1892—when the plant was surrendered, on the order of the court, to the receiver appointed in this suit: Andrews' dep., p. 454, Record. The order requiring the plant to be turned over to the receiver was, as will more fully appear hereafter, reversed by the Court of Appeals upon appeal, and, in execution of the mandate on the appeal, the plant was restored by the receiver to said Oconto City Water Supply Company which has ever since owned, held and operated the same.

Fifty-second: Jan. 2, 1892, complainant recovered judgment at law against defendant Oconto Water Co. for $24,250.04—the unpaid balance of the price of the pipe, interest and costs of suit—issued execution thereon Jan. 15th—which was returned unsatisfied the same day—and on Jan. 18th filed its Bill herein, suing only in the character of *a general judgment creditor.*

The relief sought by the bill, as against Andrews & Whitcomb—who were charged in the bill as holding and operating the plant without right—was

1st: The nullification of their title to the bonds, plant and franchises acquired by them through the foreclosure of their securities, and of all the instruments under which they claimed, and the sequestration of such property for the creditors of the company.

2nd: To have Andrews & Whitcomb charged as stockholders of the Water Company, and

3rd: For an injunction and receiver of the property *pendente lite*.

Feb. 27, 1892, Andrews & Whitcomb answered the bill at great length, admitting complainant's claim against the Water Company and showing in detail all of the corporate acts of, and all of their own transactions with the company, their efforts and failure to secure co-operation of the other creditors to save, complete and jointly enjoy, without preference, the property, the manner of their subsequent acquirement of title to the stock, bonds and property covered by their securities, and their possession under such title, and claimed such title free and clear of all adverse interests.

Upon filing the bill complainant obtained an order that defendants show cause why an injunction should not issue and a receiver of Oconto Water Company be appointed pursuant to the prayer of the bill. The motion was heard on the bill and answer, and submitted March 3, 1892, and taken under advisement.

October 10th following, the motion was granted—the court holding, as to the bonds pledged to Andrews & Whitcomb by the Water Company, that they constituted an absolutely void issue because issued for less than 75 per cent. of their par value contrary to the provisions of §1753 of Sanborn & Berryman's Annotated Statutes of Wisconsin, and as to "the Oconto Water Works franchise as issued to said Oconto Water Company" by the City of Oconto by its ordinance No. 153, that nothing passed to Andrews & Whitcomb by the company's attempted transfer thereof to them because, not only was no grant of any *franchise* ever made by the city to the company, but the city was without *power* to make such a grant: opinion of Circuit Judge *in Andrews et al. v. Nat'l Foundry & Pipe Works, Ltd.*, Vol. 10, C. C. A., p. 60—and thereupon Albert E. Smith, of Milwaukee, was appointed receiver

> "to take charge of the property and effects of the said de-
> "fendant Oconto Water Company..... and to receive all
> "the rents, issues and profits arising from said property, and
> "particularly to take possession of, manage, operate and
> "control the water plant owned and constructed by said

"defendant Oconto Water Co., in the city of Oconto, Wis-
"consin, and all the property, rights, privileges and fran-
"chises belonging to or used or connected therewith until
"the further order of the court....."

It was further ordered that the defendants

"deliver over to the receiver all the property and effects of
"all kinds and descriptions in their hands or under their
"control belonging to or in any wise connected with said
"water plant, together with all deeds, writings, books of
"account, papers, vouchers and other evidences relating or
"appertaining to said plant or property."

It was further ordered that the defendants

"deliver to Edward Kurtz, clerk of this court, all the bonds,
"to-wit: One Hundred Thousand Dollars ($100,000) par
"value, of the bonds of said Oconto Water Company now in
"their possession, to be held by said clerk subject to the
"further order of this court."

It was further ordered

"that an injunction issue under the seal of this court re-
"straining said defendants Oconto Water Company, S. D.
"Andrews, W. H. Whitcomb, City of Oconto and Oconto
"City Water Supply Company from holding, managing or
"interfering in any way with the rights, franchises, prop-
"erty, rents, profits, bonds and affairs of said receiver, and
"from asserting any right, title or interest in said property,
"or the rents issues and profits thereof, until the further or-
"der of this court."

Possession of all of the property as so ordered was immediately given the receiver.

Nov. 4th following, Andrews & Whitcomb prayed and were allowed an appeal to this court from the order of Oct. 10th granting the injunction and appointing the receiver.

Upon the appeal this court reversed those parts of the order appealed from granting an injunction and ordering Andrews & Whitcomb to turn over the Water-Works plant to the receiver—holding not only that a franchise to construct and operate the plant was mortgaged to Andrews & Whitcomb by the security-instruments given them by the Water Company, but that the Water Company held such franchise by lawful grant under competent power, from the city—and by its mandate ordered

"that those portions of the order of the circuit court where-
"by the receiver was directed to take and the appellants to
"surrender possession of the property, excepting the bonds
"aforesaid, and the appellants enjoined from asserting title,
"be set aside, and that the possession be restored to the ap-
"pellants unless for some cause not apparent in the record

"before us, the possession of the receiver should be con-
"tinued;" mandate, p. 145, Record.

Upon the remittitur being filed in the court below complainant moved that court upon the entire record in the case and certain affidavits and other documents filed and exhibited to the court for an order continuing the possession of all property in the receiver, which motion Andrews & Whitcomb opposed with counter-affidavits and documents filed and exhibited in like manner, from all of which it appeared to the court

"that on or about the 12th day of July, A. D. 1892, all the
"right, title and interest of, together with the possession of,
"the plant and property and rents, issues and profits herein
"mentioned, had been assigned, transferred and delivered by
"said defendants Andrews & Whitcomb to the Oconto City
"Water Supply Company, and that such company was in
"possession thereof at the time the same was delivered over
"to the possession of said receiver,"

whereupon the court, on the 25th day of July, 1894, ordered

"that the possession of all the property taken by the receiver
"herein under the order of said court dated October 10,
"1892, together with the rents, issues and profits thereof
"while in the operation of said receiver—an itemized re-
"port or statement of which is to be filed herein by said re-
"ceiver—except the sum of Three Thousand Dollars
"($3,000) to be withheld by said receiver subject to the
"further order of the court, and except also all the books,
"records and papers belonging to said defendant Oconto
"Water Company, be delivered over to the said Oconto
"City Water Supply Company upon its executing a bond
"in the penal sum of Twenty Thousand Dollars ($20,000),
"with two sureties to be approved by the clerk of this court,
"that it will restore to the possession of said receiver all of
"the aforesaid property so directed to be turned over to it
"at any time the court shall order the same."

By the same order it was further ordered

"that all things herein ordered to be done shall be done
"without prejudice to the final adjudication of the rights
"of the parties hereto at the final hearing of the action;"
pp. 150-1, Record.

On the same day the receiver, pursuant to such order, restored to the Oconto City Water Supply Company—the required bond having been given—all of the property so ordered to be restored, including $10,347.22, the balance of the rents, issues and profits arising from the operation of the Water-Works plant, then remaining in his hands as receiver, withholding in accordance with the terms of said order the sum of Three Thousand Dollars ($3,000), and said company has ever since held the same and operated the plant as owner.

Fifty-third: July 20, 1892, replication was made to the answer by complainant, and, the proofs having been taken, the case went to final hearing Dec. 11, 1894, upon such pleadings and proofs, before Jenkins, Circuit Judge.

At the hearing it was claimed for Andrews & Whitcomb that, since the pleadings and proofs showed that complainant and the interveners were only *general* creditors of the Water Company, and therefore, as such, without any interest in its property at the time they—Andrews & Whitcomb—acquired title to the property, their title could only be attacked for fraud, or want of power, *ab initio*, in the Water Company to create their securities and that unless fraud or such want of power was shown complainant must fail in its claim for relief in respect of the bonds, water-works plant and franchises, and must prevail, if at all, on their second claim—to have Andrews & Whitcomb charged as stockholders.

As to the latter claim it was said for Andrews & Whitsomb

First: That unless the court should hold that they lawfully held the stock *only* as pledges of the Water Company, its issue to them was a nullity by force of the statute (§1753), Sanborn & Berryman's Annotated Statutes—because issued for less than its par value—and imposed upon them—they not being stock subscribers—no obligation to pay for it, and

Second: That the issue was made to them solely under the contract between them and Oconto Water Company, of September 13, 1890, whereby the *company* agreed to *pledge* them its entire issue *as security*, and they therefore held *only* as pledges of the corporation, liable (in the obsence of an estoppel) neither to the corporation or its creditors, as stockholders.

The suits of complainant and interveners R. D. Wood & Co., for the foreclosure of their alleged liens, though pending when the bill herein was filed, did not go to decree until Oct. 3, 1892, and Feb. 20, 1894, respectively—pp. 167, 169, Record. When the legal claims above mentioned were made for Andrews & Whitcomb at the final hearing of this couse on Dec. 15, 1894, complainant and the interveners obtained leave to amend their bill and intervening petition, respectively—last clause, p. 166, Record—and thereupon complainant amended its bill and the interveners their petition of intervention setting up the obtainment of the lien decrees. By the amendments then made to its bill complainant charged that, since the filing of the bill herein a decree had been entered on the 3rd day of October, 1892, in the United States Circuit Court for the Eastern District of Wisconsin, in equity, in a cause wherein it was complainant and Oconto Water Company was defendant, whereby complainant

> "has obtained a mechanic's lien upon the well, buildings,
> "machinery and entire water-works plant, and all the right,
> "title and interest of said Oconto Water Company, or of

"any person claiming under it, in and to the premises upon "which said plant is located, and the franchise of maintain- "ing and operating said plant for the uses to which it is "devoted by the law of its incorporation as an entirety, said "lien dating and commencing on the 15th day of Septem- "ber, A. D. 1890, which said mechanic's lien, together with "any and all other mechanics' liens decreed against the "aforesaid premises, said complainant alleges and claims to "be a first lien upon the same and entitled to priority over "all other liens asserted by or on behalf of any of said de- "fendants."

It also charged that in making the sale and delivery of the pipe and material it had no knowledge, information or notice of the contract or assignment of Sept. 13, 1890, made between the Water Company and Andrews & Whitcomb and that in making such sale and delivery it relied upon the franchises of the Water Company being free and clear of all liens and encumbrances, and charged that if it had had any knowledge or notice of said contract or assignment it would not have made said sale or delivery and would not have given credit to the Water Company.

It followed these allegations with this most remarkable one—in view of those just referred to—to-wit:

"Said complainant alleges that it made no examination "of the records in the office of the register of deeds of "Oconto County or the city clerk of Oconto, nor did it "make any other inquiry as to mortgages or encumbrances "on the franchise of said Oconto Water Company prior to "the making of the aforesaid contract or the delivery of said "materials. This complainant therefore alleges that as "against other creditors of said defendant company the said "instruments dated Sept. 13, 1890, were and are and each "of them was and is null and void."

The amendments made to their intervening petition herein by the interveners R. D. Wood & Co. charged that since the filing of their intervening petition herein, to-wit: the 24th day of Sept., 1892, a decree had been duly made and entered in the circuit court of the United States for the Eastern District of Wisconsin, in equity, in a suit wherein the interveners were complainants and Oconto Water Company was defendant, on the 20th day of Feb'y, 1894, whereby, among other things, it was decreed that the Water Company was indebted to them in the sum of $3,575,

"and that said sum is and was a mechanic's lien under "chapter 145 of the Revised Statutes of Wisconsin of 1878 "and the acts amendatory thereof, upon the well, buildings, "machinery and entire water works plant of said defendant "in the city of Oconto, Wisconsin, and upon all the right, "title and interest which the defendant Oconto Water Com-

"pany had in and to the premises hereinafter described from "and after the day of the commencement of the construc- "tion of said well, buildings, machinery and water works "plant upon which said lien was claimed, to-wit: the 15th "day of September, A. D. 1890, or which said defendant "or any or all persons claiming under it have since acquired "therein. Which said mechanic's lien, together with any "and all other mechanics' liens decreed against the afore- "said premises, these interveners allege and claim to be a "first lien upon the same and entitled to priority over all "other liens asserted by or on behalf of any of the defend- "ants in this action."

They also charged that at the time of the sale and delivery by them to the Water Company of the hydrants they had no knowledge, information or notice of any contract, assignment or agreement between the Water Company and the defendants Andrews and Whitcomb in any way affecting the title or in any manner a lien or claim for lien upon any franchises or other property of the Water Company, and that they had no notice thereof until on or about Jan'y 12, 1891.

They also charged that in making their contract with the Water Company for the sale and delivery of the hydrants they relied upon the franchises of the Water Company being free and clear of all liens and encumbrances and that if they had had any knowledge or notice of the contract or assignment dated Sept. 13, 1890, made between the water company and Andrews & Whitcomb, they would not have made the sale or delivery of such material to the company or contracted to do so or given any credit to the water company, and they charged that said instruments of September 13th, between the company and Andrews & Whitcomb, as against the other creditors of the company "were and each of them was and is null and void."

They did not charge that they had ever made any effort to inform themselves as to the financial condition, or whether any encumbrances existed upon any property of the Water Company.

They did not charge, as complainant did in its amendments, that the lien decree obtained by them *covered the franchises of the Water Company.*

Neither the prayer of the bill or intervening petition was amended upon the making of these amendments: pp. 169, 170, Record.

Andrews & Whitcomb, under leave of court obtained upon the making of these amendments, at once amended their answer admitting the obtainment of the lien decrees as stated, with this exception: they explicitly denied that any lien for any sum was ever decreed in favor of complainant "upon said

defendant Oconto Water Co.'s franchise of or for maintaining and operating its said water works plant."

They further admitted that for anything they knew to the contrary complainant had no actual knowledge, information or notice of the contract or assignment of September 13, 1890, between themselves and the Water Company, at any time before completing delivery of the material which it sold the Water Company. They also admitted the allegations above quoted of complainant's amended bill showing that it had never made any attempt before completing such delivery to ascertain whether any encumbrances upon the property existed or not.

They denied that complainant in making the sale and delivery of the pipe to the Water Company relied on the franchise of the company being free and clear of liens or encumbrances, and alleged, on the contrary, that it made such sale and delivery uninfluenced by any consideration of the question as to whether there were any liens or encumbrances upon any of the property of the company and without doing anything whatever to ascertain whether any such had been placed or made by the company upon any of its property.

They then charged that they were not parties to the action or in privity with any party to the action in which the lien decrees were made, and that they were in no way bound by any of the provisions of said decrees so far as they declared or extended liens upon any of the property described in the amended bill and intervening petition, and they charged that said decrees, so far as they decreed such liens, were absolutely void as against them, and they asked that their amended answer might be considered as a cross-bill herein to complainant's amended bill and the petition of intervention, and that such affirmative relief might be granted them as under the law and the rules and practice of the court they might be entitled to and especially that complainant's claim, and all other claims for a lien herein, whether based upon decree, judgment or other form of claim, be, as against them and those claiming under them and as against any interests which they or any of them might be decreed to have in any of the property affected by this action, decreed to be of no force or effect and absolutely void and cancelled: pp. 171-2-3-4, Record.

Fifty-third: Upon the coming in of this new matter it was claimed for Andrews & Whitcomb (who were not parties to the lien-foreclosure actions) on the strength of *Hassel v. Wilcox*, 130 U. S., 493, where it was held of a lien-judgment obtained and sought to be asserted *in a precisely similar way*, that

> "It is essential to such a proceeding (the one in which "the lien-judgment was rendered) that there should be at "least constructive notice, by some form of publication or "advertisement, to adverse claimants, to appear and main-

"tain their rights, before a judgment in such a proceeding "can operate, even as *prima facie* evidence,"

and on the strength of *McCoy v. Quick*, 30 Wis., 521, and *Cummings v. Taber*, 61 Wis., 185, where the same doctrine was held, —and see *Landauer et al. v. Espenhain et al.* (Sup. Ct. of Wis., Feb. 2nd, 1897) 70 N. W. R., 287, where it was said of a judgment: "No doubt that judgment is conclusive upon the parties to the action and their privies. It binds no others. As a rule, a judgment is not admissible in evidence, either for or against a stranger to the action,"—that the amended bill and petition (which only pleaded the rendition of the lien-judgments and that complainant and interveners claimed liens upon the property, not by virtue of any *original lien rights*, but by virtue alone *of such lien-judgments*) did not change the issues made by the pleadings as they stood before their amendment, as the judgments pleaded were not even prima facie evidence, *as against them*, of any lien rights. Thereupon complainant and the interveners moved the court, April 11, 1895,—five months after the submission of the case—

"for an order permitting said complainant to file an "amendment to its bill herein or a supplemental bill or an "intervening petition, so that the pleadings herein may "show with greater certainty and particularity that said "complainant claims to have and enforce against the "property of the said defendant Oconto Water Company, "as against the said company and all the said defendants "herein, a mechanic's lien under the statutes of the state "of Wisconsin and the decision and decree of said court."

"The court disposed of the motion by ordering that "the submission of this cause on the 15th day of Decem- "ber, last, be and hereby is set aside, and that the com- "plainant have leave to amend its bill as it may be "advised withing 24 hours, and that the intervening peti- "tioners may amend their petitions within same time, and "that the defendants Andrews & Whitcomb answer such "amended bill and amended petition within 24 hours "thereafter.

"And it is further ordered that the complainant and "intervening petitioners R. D. Wood & Co. be allowed ten "days after the filing of such answer to take further proofs, "and that said defendants be allowed fifteen days after "complainant's and R. D. Wood & Co.'s proofs are closed "to take theirs and that the complainant take any rebuttal "evidence within five days after defendant's evidence is "closed." P. 619, Record.

Thereupon complainant again amended its bill by attempting to state the usual cause of action *for the foreclosure of a*

mechanic's lien under the Wisconsin statute, and amended the prayer of the bill by asking, amongst other things,

> "that said complainant and R. D. Wood & Co., intervening "petitioners herein, be decreed to have mechanic's lien "against the property and franchises of said defendant "Oconto Water Company, and that such liens be adjudged "prior in time to any lien or incumbrances on said prop- "erty asserted or claimed by or on behalf of the defend- "ants S. D. Andrews and W. H. Whitcomb, and that upon "final distribution of the property of the said defendant "Oconto Water Company, or the proceeds of the sale "thereof, the said complainant and said R. D. Wood & "Company be first paid the amount of their respective "claims as secured creditors:" pp. 620–1, Record.

The interveners R. D. Wood & Company at the same time again amended their petition and its prayer in substantially the same way: pp. 622–3, Record.

Andrews & Whitcomb answered the amended bill admitting all its allegations of fact except the allegation that the claim for a lien filed by complainant as required by the statute "was in all respects a compliance with the statutes of the State of Wisconsin," as to which the admission was that an instrument, a copy of which was attached to and made a part of the answer, was the only one filed; and except the allegation that the 15th day of September, 1890, was the date of the commencement of the construction of the plant, which they denied, alleging September 28th to have been the date.

They further answered the amended bill by pleading the following section of the mechanic's lien law of the state, to-wit:

> "No lien hereby given shall exist, and no action to "enforce the same shall be maintained, unless within six "months from the date of the last charge for performing "such work and labor, or of the furnishing of such "materials, a claim for such lien shall be filed as herein- "after provided, in the office of the clerk of the Circuit "court of the county in which the lands affected thereby "lie, nor unless such action be brought within one year "from such date, unless within thirty days next preceding "the expiration of one year, the person filing the lien "shall make and annex to the instrument on file, an "affidavit setting forth the interest which he has by vir- "tue of such lien in the property therein mentioned, upon "which affidavit the clerk shall endorse the time when "the same was filed. The effect of such affidavit shall "not continue beyond one year from the time when such "lien would otherwise cease to be valid as against subse- "quent purchasers, liens or mortgages, in good faith.

"Such claim for lien may be filed and docketed within "such six months, notwithstanding the death of the owner "of the property affected thereby, or of the person with "whom the original contract was made, with like effect as "if he were then living:"—§ 3318, S. & B.'s Anno. Stats. of Wis.—and followed it by allegations negativing compliance on the part of complainant with any of its provisions save the filing at the time and place alleged, of the instrument before alluded to and the commencement of the suit in which its lien decree was obtained, pleading specially, the limitation statute of one year in which the action to foreclose the lien is required to be commenced, as a defense against the cause of action stated in the last amended bill for the foreclosure of the alleged lien right.

They further answered denying that complainant was entitled to any of the relief asked for in its amended bill and asking the same advantage from their answer to it as if they had pleaded or demurred to it.

The copy attached to their answer, of the instrument filed as the claim for a lien, neither describes or mentions or claims any lien upon the Water Company's *franchise* and only prays for a lien "upon said pipe and plant erected as aforesaid, and upon all the right, title and interest which said Oconto Water Company had in and to said premises (before described by metes and bounds) upon which said plant and well are situated and to which said pipes are connected;" pp. 628-9, Record.

To the amended petition of the interveners R. D. Wood & Co., Andrews & Whitcomb answered, referring to their answer to the amended bill and asking that the same, so far as applicable, stand as their answer to such petition.

They further answered, admitting all of the allegations of fact of such petition except the one that the claim for a lien filed on the 19th day of January, 1891, "was in all respects a full compliance with the statutes of the state of Wisconsin," as to which they answered setting forth a copy of the instrument itself as Exhibit "A" of the answer, and denying that any other instrument or claim for a lien was ever filed by or for said R. D. Wood & Co. save that they filed, at the time and place alleged, another instrument in the words and figures of Exhibit "B" of their answer.

They further answered denying that September 15, 1890, was the date of the commencement of the construction of the water works plant, alleging September 28th to be the date.

They further answered the amended petition as they did the amended bill, all as above stated, and asked the same advantage of their answer as if they had pleaded or demurred; pp. 630-636, Record.

Replication to these answers was made by complainant

and R. D. Wood & Company and proofs were then taken by them in support of the cause of action—imported into *this* action by their last amended or supplemental bill and petition—for the foreclosure of their alleged lien rights, which consisted wholly of the testimony of Mr. Mullen, testifying *only* to what the books and other documents in the hands of the receiver showed, all upon the subject, only, *of the date of the commencement of the construction of the plant*—pp. 639-647, Record—and all under objection, on the ground of competency, and also because

> "First. It is irrelevant, the amendments to the bill "and its prayer in that behalf having been improperly "allowed in this:
>
> "1st. They change the entire form and scope of the "action and the original bill, and
>
> "2nd. The cause of action for the foreclosure of the "lien claim was barred when application to amend the "bill was made.
>
> "Second. It is incompetent because the statute under "which the lien right is claimed gives no lien upon, "and does not apply to, water works property like that "upon which the lien is here claimed." P. 641, Record.

Andrews & Whitcomb offered no evidence upon this issue, and the allegation by complainant and R. D. Wood & Company in their supplemental bill and petition that construction work commenced *September 15, 1890*, is supported by *no testimony at all*, Mr. Mullen's testimony, incompetent as it is, *and the only testimony in the case upon the subject*, fixing it not earlier than *September 16th*, a date unquestionably later by one day, if not by three days, than the date when Andrews & Whitcomb's security-instruments of September 13th took effect.

Fifty-fourth: The tract of land upon which the pumping station of the water works plant was coustructed was, at the time the Water Company received its franchise from the city, the property of the city of Oconto. The Water Company thereafter was let into possession of the tract by the city and allowed to construct its pumping station thereon under a verbal contract for a conveyance by the city to the company of the land whenever it paid the city the sum of $1,250 therefor. This it had not done at the time the property went into the hands of the receiver, but during the receivership the court made an order allowing the receiver to pay the city, out of the receivership funds in his hands, for the land, upon receiving a conveyance thereof from the city to himself, as receiver. This order was made Jan'y 23, 1894. Feb'y 5th, following, Andrews & Whitcomb applied to have the order modified so as to provide that the deed to be given by the city should run to the receiver as grantee, instead of to the Water Company, but the

court refused to make the modification, expressing the following reasons therefor:

> "I do not think the modification should be granted. "A receiver does not by virtue of his appointment take "title to realty. He is merely appointed for the preser- "vation of property *pendente lite*, and it would be quite "out of the ordinary course of things, where the equit- "able title is in the insolvent company, and the legal "title to which it is entitled is thereafter acquired, to "have that title taken in the name of the receiver. The "court has all necessary power by any decree to make "proper disposition of the title in the interest of the "parties to whom it may properly descend by virtue of "any legal proceedings."

The deed of the land was therefore made by the city directly to Oconto Water Company which still holds the legal title of the property so created: pp. 132-136, last clause, p. 667, Record.

This suit was begun Jan. 18, 1892, as a creditors' suit to collect complainants' money judgment of $24,250.04, on return of execution unsatisfied. The bill alleges that the stock issued to Garland and also to Andrews & Whitcomb was void and prays that it be so adjudged: avers that the franchises, stock and other property of the Water Company are a trust fund for appellee and the "*other unsecured creditors*" of the company, and asks that the contract of Sept. 13, 1890, and its extensions and the bonds delivered thereunder be cancelled, without offer of payment of the debt they secure, and that Andrews and Whitcomb be adjudged to pay the full amount of the unpaid stock held by them in pledge, for the benefit of the "*unsecured creditors.*"

Appellee poses in the original bill herein as a remediless, *unsecured creditor*. Had it shown the lien claimed and decreed in the lien suit, the bill must have been dismissed; for with a specific lien on property worth three times the amount of its debt, appellee had no need of relief by creditors' suit. The subsequent lien decree of the federal court impelled it to rely on its lien, and to turn the creditors' suit, in part, to one to bind Andrews and Whitcomb, the city of Oconto and the Oconto City Water Supply Co., who were not parties to the lien suit, by the decree therein. Hence, on April 11, 1895, it amended its bill to aver all the facts to show a lien, as they were averred in the lien suit. It did not plead the lien decree as an estoppel, or aver that Andrews and Whitcomb or the city of Oconto, or the Supply Company were constructive parties to the lien suit, or any fact to show that they were such parties. The prayer of the bill was amended to ask that appellee and R. D. Woods and Co.—the only lien claimants—"*be decreed to have mechanics' liens*" against the plant, prior to any lien of Andrews and

Whitcomb (Case 620). The issue thus tendered was tried. Appellee introduced all the testimony in the lien suit, to show the lien, and additional proof showing that the lien originated one day later than that fixed by the lien decree. (Case 333 to 385, 639, 653.)

The debt of Andrews and Whitcomb is now, with interest, over $100,000.00, and the debts of the complaining creditors about $40,000.00. The value of the water works is not more than $75,000.00 (Case 242). The decree appealed from adjudges that the security instruments executed by the Water Company to Andrews & Whitcomb, were made in good faith, for a valuable consideration and were not withheld from record by their procurement, with their consent, nor in fraud of creditors, but because the lien decrees, to which full effect was given, recited the construction of the water works plant commenced Sept. 15, 1890, the liens decreed to complainant and R. D. Wood & Co. by such decree took precedence of the liens created by Andrews & Whitcomb's decree instruments of Sept. 13, 1890, and were first liens upon the plant and franchises of the Water Company; cancels the bonds held by them as collateral, without payment of their debt; and requires them, as absolute owners of the unpaid stock, to pay the lien debts not paid by enforcement of the liens, and the unsecured debts, not exceeding $100,000.

Specification of Errors Assigned and Relied On by Appellants.

It was error

First: To hold that Andrews & Whitcomb were privies of Oconto Water Company as to the mechanics' lien decrees.

Second: To hold that complainant and intervener R. D. Wood & Co. had liens upon any of the rights, franchises or property of, or upon the plant constructed by, Oconto Water Company in the city of Oconto.

Third: Not to hold that the liens and title acquired by Andrews and Whitcomb upon and to such franchises and plant were superior and paramount to all other liens upon or rights in such property and that they or their grantee Oconto City Water Supply Company have ever since such title was made held the same free and clear of all liens.

Fourth: To hold that Andrews & Whitcomb became stockholders or owners of the stock of Oconto Water Company before they purchased it at their mortgage foreclosure sale.

Fifth: To hold that there ever was a valid issue of such stock or, if there was, that it had not been paid for in whole or in part.

Sixth: To hold that the receiver was entitled to compensation for services or to counsel fees out of the funds of his receivership.

Seventh: To hold the bonds issued by the Water Company to Andrews and Whitcomb void and order them cancelled.

Eighth: To hold that the mechanic's lien laws of Wisconsin gave a lien upon the franchises or plant of Oconto Water Company.

For Assignments of Error see pp. 676-7 and 681, Record

ARGUMENT.

The effort of the argument will be to ascertain the rights of Andrews & Whitcomb, legal or equitable, from the execution of the Menasha agreement on the night of Sept. 13, 1890, and follow them through every change by which they were affected, noting the effect as it occurred, up to the renditon of the decree here under review.

As to the Agreement of Sept. 13, or "Menasha Agreement," so-called—

Unless the Menasha agreement was a *nullity*, it was a valid agreement for a mortgage of the Water Company's ordinance-franchises and for a pledge of its capital stock and bonds to Andrews & Whitcomb as security for the payment of the loan to the company therein contracted for.

It is said for complainant that the instrument was, until formally ratified at the stockholders' and directors' meetings of Oct. 29th—paragraphs 33-4-5, Statement of Facts—void as a corporate contract because

1st: It had not the corporate seal, and

2nd: It was unauthorized by formal consent of a majority of the stockholders or by a resolution of the board of directors.

I.

The instrument was executed on the part of the Company by Garland, as president, and Todd, as secretary, and purported to be the contract of the company.

It was not essential to validity that it should bear the corporate seal. It was good as an agreement *for* a mortgage. Such agreements are not required to be under seal; *Ford et al. v. Hill*, 66 N. W. Repr., 115 (Wis. Jan'y 28, 1896). It is only required that they satisfy the statute of frauds. An individual no more than a corporation can *convey* land or an interest in land except by an instrument under seal, and yet it is universally held that an individual may make a valid agreement for such a conveyance without seal and no difference is recognized by the courts between individuals and corporations in this particular.

The law is well stated—and supported by cases from all

the courts in a note to the text—in Vol. 4, Amer. & Eng. Encyc. of Law, page 242, under heading "Use of Corporate Seal," as follows–

> "At common law, when a corporation is duly created, "it is tacitly annexed as an incident, that it may have a "seal, and may make or use what seal it will, and this "statement expresses the law as it is today. It was "also a doctrine of the common law that a corporation "spoke alone by its common seal and its contracts and "acts were only valid when its seal was affixed by a duly "authorized agent; but this rule has been wholly discard-"ed. For it has been substituted the universal rule that "a corporation is like an individual in its capacity to "contract, appoint agents, and incur ordinary liabilities, "and that the use of a seal is only necessary where its "use would be required from an individual."

It was held in *White etc. vs. Fitzgerald etc.*, 19 Wis., 480, that an instrument sufficient to satisfy the statute of frauds was good without seal, witnesses or acknowledgment.

Section 2216 R. S.—the statute prescribing how corporations shall execute *conveyances* of lands, or any interest in lands—relates alone to instruments *conveying* land or an interest in land. It has no reference whatever to a *contract for such a conveyance.* The difference is illustrated by the cases holding that a *contract* for the sale of land may be signed by an authorized agent; the *conveyance* can only be executed by the vendor, or his agent, authorized in writing; *Dodge vs. Hopkins*, 14 Wis., 630, *Smith vs. Armstrong*, 24 Wis., 446.

If the instrument was valid without the corporate seal, it is a contract giving rise to a lien, an equitable mortgage—Pom. Eq. (2nd Ed.) §§ 685, 165-167; Cook on Stock etc. (3rd Ed.) § 794; and see *Bridgeport Electric and Ice Co. v. Meader* (C. C. A. Fifth Circuit, Dec. 10, 1895), 72 Fed. Repr., 115, and *Central Trust Co. v. Bridges*, 6 C. C. A. (Sixth Circuit), 539, 554-5, for cases in point and exhaustive discussions of the doctrine of equitable mortgages, with full citation of authorities.

II.

It is not open to creditors or to any but stockholders to raise the question that the contract was not preceded by the formal consent of the stockholders or by resolution of the board of directors: Mr. Justice Harlan in *Hervey v. Ill. etc. R'y Co.*, 28 Fed. Rpr., 169; *Witter v. The G. R. F. M. Co. et. al.*, 78 Wis., 543; *Gano v. C. & N. W. R'y Co.*, 60 Wis., 12; *Lehigh Valley Coal Co. v. West Depere Agri. Works*, 63 Wis., 45; Mr. Justice Swayne in *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 644.

But if it were otherwise — since the contract was not *ultra vires* and its benefits were at once accepted by the corporation — the corporation was bound.

It was said in *Gano v. C. & N. W. R'y Co.*, supra,

> "A corporation is bound by a contract *not* ultra vires "made with it in good faith by a person unaware of any "defect of authority or irregularity on the part of those "acting for the corporation and as to which there is nothing "to excite his suspicion."

As said before, the contract was executed for the corporation by its president and secretary, who were also its only directors at the time—par. 11, Statement of Facts—and owners of all the stock.

In speaking of the power of the president of a corporation to bind the corporation by his acts without special authority, Cook, in the third edition of his work on Stock and Stockholders, § 716, p. 1078, says:

> "And in all cases the president binds the corporation "by his acts and contracts when, etc., etc., etc.; or when he "has been permitted by the corporation for some time to "act and contract for it; or when the company ratifies or "accepts the contract after it is made, or accepts the benefit "of the contracts. Having knowingly received the benefit "of a contract made and carried out by the president, even "without authority, the corporation must perform on its "part. The law seeks to obtain substantial justice in these "matters."

In note to this text a great many supporting authorities are cited.

The rule is the same in Wisconsin; *Ford et al. v. Hill* (Sup. Ct. Wis., Jan'y 28, 1896), 66 N. W. Rpr., 115.

The powers of Garland, as president, under the Corporate Articles—Article VI, p. 548, Record—were as large as those conferred by the Corporate Articles considered and held sufficient in the case last cited.

> " That a corporation cannot repudiate its contract when " it has received the benefit thereof, when such contract " is not expressly prohibited by law, is well settled by the " authorities, and it is equally well settled that when the " stockholders assent to such contract, and the avails of the " contract are used for their benefit, they cannot avoid such " contract. This has been so often held by the courts that " it is almost unnecessary to cite authorities to sustain the " proposition. This court has held this doctrine in *North* " *Hudson M. B. & L. Asso. v. First Nat'l Bank*, 79 Wis., 31; " see also *Kneeland v. Gilman*, 24 Wis., 42, and cases cited: " *Sheldon H. B. Co. v. Eickemeyer N. B. Co.*, 90 N. Y., 607,

"613; Tayl. Corp. §§ 212, 214, and cases cited;" *Witter v. The G. B. F. M. Co. et al.*, 78 Wis., 546.

Creditors stand in the right of their debtor and are equally estopped except where there is fraud or collusion; *Graham v. LaCrosse & M. R'y Co.*, 102 U. S., 106; Mr. Justice Cooley in *French v. DeBow et al.*, 38 Mich., 708.

When it is considered that complainant and all the interveners, in all their dealings with the company, dealt with the same officers, as its agents, who represented the company in its dealings with Andrews & Whitcomb, Sept. 13th—the officers acting all the time under the same authority—it will be seen that it does not lie in their mouths to say the officers had authority to make the contracts *they* rely on but not those relied on by Andrews & Whitcomb. What different authority is required to contract debts amounting to $34,638.52 for the pipe, hydrants and valves and other material for such a plant than for a loan of $40,000 in money to pay for its construction? Besides, complainant's dealings with these officers ante-dated Andrews & Whitcomb's transactions with them by half a month and Andrews & Whitcomb dealt with them *after* having knowledge that the officers represented the company in buying the pipe—qq. 36 to 39, Sturtevant's dep., p. 410, Record—and they might well rely on their having authority to represent the company after that.

If there was authority to contract debts for material, there was equal authority to contract for a loan of money, and with this power always goes the implied power to contract for the giving of security by way of mortgage; Thompson's Corporations, §§ 6131-2-3, Vol. 5, and cases cited.

As to When the Menasha Agreement Took Effect.

Question was made in the court below as to when the Menasha agreement took effect. It was said for complainant, and held by the court, that notwithstanding it was fully executed and the company's note for $2,500 delivered to Andrews & Whitcomb under it Sept. 13th, it was nevertheless not delivered on that day nor until the 15th, because it was not placed in the bank until the 15th.

There is no evidenee to support the view that the instrument did not become operative at once *upon its execution*, or that it was placed in the bank *to constitute delivery*. The instrument was executed to serve a temporary purpose—to stand as the evidence of what had been agreed upon until formal duplicates, one for each party, could be made—and was to be, in the meantime, placed in the bank, not to constitute delivery but *for safe*

keeping for the benefit of both parties. If the bank had been open at the late hour it was executed, it would have been left there on the 13th, but it was not and Sunday being the next day, it was not deposited until Monday, the 15th. The case presents nothing tending to show that the instrument was not, when executed on the night of the 13th, considered operative by both parties from that time. They certainly understood that when the instrument was executed their rights and liabilities were fixed; were not in suspense until a formal delivery of the instrument could be made to the bank on Monday. When the parties separated that night, had any one the idea that there remained to be done anything *to make the instrument operative;* that delivery and acceptance of the instrument had not taken place? Not a witness has expressed this view. Who was to take charge of the instrument in the meantime? What was to be its status until left with the bank? Not a word about this. The parties all thought upon separating that a valid and obligatory contract existed. They recognized it as having become executory by partially executing it *that night* by giving Andrews & Whitcomb the note for the first advance of money, to be obtained Monday. The note was dated the 15th—Monday—because the money could not be had until then; but as soon as Monday came the note was good and as soon as it became good it stood for that much money advanced by Andrews & Whitcomb under the contract. Why was the note given Saturday, pursuant to the contract, if the contract itself was to await delivery to the bank before becoming executory? Is it likely that Garland and Todd would have delivered the company's note for $2,500 to Andrews and Whitcomb if they had not supposed a valid contract then existed that protected the company? For the facts see Par. 17, Statement of Facts.

Conclusion Upon the Foregoing.

The conclusion is that the Menasha instrument, though unsealed and though executed by the president and secretary of the water company without the formal consent of a majority of the stockholders or without a resolution of the board of directors, was good as an equitable lien *as soon as executed*, and the subsequent formal duplicate agreements for and the mortgage to Andrews & Whitcomb and the Trust Deed (*Central Trust Co. v. Bridges*, 6, C. C. A., 539, 554-5) securing the bonds pledged to them amounted to a mere continuation of the same security *for the same debt*, or, as said by the Supreme Court of Wisconsin in a similar case—*Rees v. Ludington et al.*, 13 Wis., 276, 282—constituted "but parts of the same transaction, done in pursuance of the same agreement, and have such operation only as

will best promote the lawful intention of the parties. Their operation is contemporaneous and connected and affords no opportunity for the liens of judgment or other creditors of the grantee to attach to the legal estate before that of the grantor (the equitable lien holder) for the unpaid price." To the same effect are *Eggemann v. Eggemann*, 37 Mich., 436; *Thorpe v. Durbon*, 45 Iowa, 142.

It does not matter that the principal part of the loan was actually advanced after the work of construction commenced, since it was all made under an agreement which took effect as an equitable lien upon the property before the work of construction commenced: *Wis. P. M. Co. v. Schuda et al.*, 72 Wis., 277.

As to the Agreement of March 13, 1891, Andrews & Whitcomb's Second Mortgage.

The only objection that has been urged against the validity of this mortgage is, that at the time of its execution the company was insolvent and could not prefer one creditor over another by mortgage or otherwise.

Though the company was undoubtedly unable to pay its debts at the time, it was nevertheless competent for it to create a *new* debt by borrowing money to complete its plant and mortgage its property to secure its payment; *Bergen v. The Porpoise Fishing Company et al.*, 42 N. J. Eq. Rep., 397; *Wilkinson v. Baurle*, 41 N. J. Eq., 635; *Chase et al. v. Denny*, 130 Mass., 566; *Sargent v. Webster*, 13 Metc., 497; *Catlin v. Eagle Bank*, 6 Conn., 233; *Smith v. Skeary*, 47 Conn., 47; *Dana v. Bank of U. S.*, 5 W. & S., 223; *Arthur v. Commercial Bank*, 9 S. & M., 394; *Town v. Bank*, 2 Doug. (Mich.), 530; *Buell v. Buckingham*, 16 Iowa, 284.

As to Andrews & Whitcomb's Title.

Sept. 12, 1891, Andrews & Whitcomb made title to the property mortgaged and pledged to them by the instruments of Sept. 13, 1890, and March 13, 1891, through foreclosure of those instruments in the state court. The title was confirmed Sept. 29, 1891; Par. 51, Statement of Facts.

As To What Property Passed to Andrews & Whitcomb Under the Title So Made.

The conveyance, following the mortgages, was of "all the rights, privileges, immunities, franchises and powers" granted the Water Company by the city of Oconto by the ordinance under which the water-works plant was constructed. By Section 1 of that ordinance it was ordained

> "That the Oconto Water Company, its successors and
> "assigns, be and are hereby authorized, subject to the

"limitations herein or by law provided, to construct, own,
"maintain and operate water-works in the city of Oconto;
"to lay pipes for the carrying and distributing of water in
"any of the streets, avenues, alleys, lanes, bridges or public
"grounds of the city as now or may hereafter be laid out;
"to acquire and hold as by law authorized any and all
"real estate, easements and water rights, necessary to that
"end and purpose, with all necessary and proper buildings,
"wells, conduits or other means of obtaining water supply,
"with all necessary machinery and attachments thereto, to
"supply the city and its inhabitants thereof with good and
"wholesome water, suitable for fire and domestic purposes,
"and for this purpose may enter upon any street, avenue,
"alley, lane, stream, bridge or public ground under control
"of the city; to take up any pavement or sidewalk thereon
"and make such excavations as may be necessary for the
"laying of such pipe and attachments."

The right "to construct, own, maintain and operate water-works in the city of Oconto" is an alienable franchise in Wisconsin; *Andrews et al. v. National Foundry & Pipe Works*, Limited, 10 C. C. A. (7th Circuit), 60.

Ownership of that franchise is ownership of the water-works since the works are indispensable to the public enjoyment of the benefits which constituted, objectively, the consideration for the grant, and to the performance, by the franchise owner, of the duties imposed by it and adhering to its ownership. The works would pass, as an incident to the franchise by a conveyance of the franchise, without other words of description; *Shamokin V. R. Co. v. Livermore*, 47 Pa. St., 469; *Pierce v. Emery*, 32 N. H., 484; *Phillips v. Winslow*, 18 B. Mon., 431; *Willink v. Morris C. & B. Co.*, 4 N. J. Eq., 377; *Shirley v. Waco T. R. Co.*, 78 Tex., 131; *Parker v. N. O., B. R. & V. R. Company*, 33 Fed. Rep., 693; *State v. N. C. R. Co.*, 18 Md., 193; 2 Washb. Real Prop. (3rd ed.), 269, 270; *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis., 322.

It is a rule of property in Wisconsin that the corporal property constituting the plant of a water-works system constructed under such a franchise, is the incident of the franchise, the franchise being the principal; *Chapman Valve Mfg. Co. v. Oconto Water Co.*, 89 Wis., 264, 273, where it is said

"nor does the franchise follow the plant by force of the
"rule that the incident follows its principal. If that
"maxim has any application, it should be considered that
"the franchise is the principal thing. All other rights
"spring from the franchise. The franchise is a grant in
"gross of an incorporeal hereditament, and is not appur-
"tenant to any particular land or property. *Fond du Lac*

Water Co. v. Fond du Lac, "82 Wis. 322." And see *Yellow River Imp. Co. v. Wood Co.*, 81 Wis., 544.

The same view was obviously held by the court of appeals in its opinion disposing of the first appeal in this case, where Woods, Circuit Judge, speaking of the contract constituting this franchise says—10 C. C. A., 66—

> "The making of such a contract would, of necessity, "carry with it the right, on the part of the contractor, to "lay the pipes and to operate the plant."

How could the plant be operated if it did not go with the franchise?

If the Water Company had completed its plant and put it into successful operation without incurring debts and then sold and conveyed to a purchaser "all the rights, privileges, immunities, franchises and powers" granted it by the City of Oconto by the ordinance under which the plant was constructed, *without other words of description*, what would it have had left? Would title to the corporeal property composing the works have remained in it? If so, it conveyed nothing for there can be no separation of the plant from the franchise, for one is the principal and the other the incident, and all or nothing would pass by a conveyance of the franchise; and it is *res adjudicata* in this case that in giving and taking the mortgages under which Andrews & Whitcomb claim "neither party intended a vain thing" and that the mortgages constituted substantial and valid securities, and were not—to use the language of Mr. Justice Woods in commenting upon them in the former opinion of the court (p. 65)—"ineffective and meaningless."

As to the Force of Andrews & Whitcomb's Title.

The title acquired by Andrews & Whitcomb through foreclosure of their mortgages related back to the date of the equitable lien or mortgage; Jones Mortg. (4th ed.) §1654; *Logan v. Stieff*, 18 Southern Rpr., 762—and cut off all but superior adverse interests in the property.

As to the Claims of Adverse Interest in the Water-works Plant and Franchises.

The amendments allowed, at the first final hearing, to the bill of complainant and intervening petition of R. D. Wood & Co. first brought their claims of adverse interests—their lien decrees—into the case; Par. 53d, Statement of Facts. Until then they had attacked, in the character of general-judgment-creditors, merely, Andrews & Whitcomb's title as based on instruments void for fraud and want of power in the Water Company to execute them and Andrews & Whitcomb had not

been called upon to contest the lien claims—not having been parties to the actions in which the lien decrees were made.

As to the Effect of the Amendments Bringing the Lien Decrees into the Case.

The amendments showing the rendition of the lien decrees did not improve the case for the lien claimants, as against Andrews & Whitcomb, because the decrees, rendered, as they were, in actions to which they were not parties and commenced long after their mortgages were made, were not even *prima facie* evidence, as against them or their title, *of any lien right* in the property.

The precise question was determined in *Hassal v. Wilcox*, 130 U. S., 493, a case on all fours with this. And see *Windsor v. McVeigh*, 93 U. S., 274, 278-9; *Keokuk & W. R. Co. v. State of Missouri*, 152 U. S., 301; *Campbell v. Hall*, 16 N. Y., 575; *Mathes v. Cober*, 43 Iowa, 512; *Bryan v. Malloy*, 90 N. C., 508; *Scate v. King*, 110 Ill., 456; *Dooley v. Potter*, 140 Mass., 49; *Coles v. Allen*, 64 Ala., 98; *Todd v. Flourney*, 56 Ala., 99; *Shay v. McNamara*, 54 Cal., 169; *Central Trust Co. v. Bridges*, 6 C. C. A., 539; *Logan v. Stieff*, (Sup. Ct. Flo.) 18 S. Rpr., 762.

The Wisconsin decisions hold the same doctrine: *Landauer et al. v. Espenhain et al.* (Sup. Ct. of Wis., Feb'y 2, 1897) 70 N. W. R., 287; *McCoy v. Quick*, 30 Wis., 521; *Cummings v. Tabor*, 61 Wis., 185.

Nor does Andrews and Whitcomb's right to question the validity of these lien decrees depend at all upon when, relatively, the conflicting interests of the parties in the property attached. If their mortgage was, *confessedly*, second in point of priority to the lien (if one existed) they could, had they been made defendants in the lien action, have contested the validity of the lien claim on any ground whatever: *Lampson v. Bowen*, 41 Wis., 484. If their mortgage-lien was, confessedly, second to the complainant's, the relation of the parties to the property and to each other would be that of first and second mortgages. This was expressly held in *McCoy v. Quick et al.*, 30 Wis., 521; See Par. V. of Opinion, pp. 528-9. The owner of a subordinate interest is never barred until he has had his day in court, or—as was said of such an interest in *McCoy v. Quick et al.*, supra, 528—

> "The old and salutary rule must prevail in this case, "and the defendants must have their day in court on *all* "questions affecting their interest in the premises, before "their rights can be concluded by the judgment of the "court."

Nor would Andrews & Whitcomb, if their mortgage was, *confessedly*, second in point of priority to the lien claim, be

bound by the lien decrees as privies of Oconto Water Company, their mortgagor and the sole defendant in the lien-foreclosure actions, for their mortgage interest *was adverse to that company.* A mortgagee is in privity with a mortgagor as to all that happens *before* the execution of the mortgage, but is not in privity with respect to anything *happening afterwards: Shattuck v. Bascom,* 105 N. Y., 39; *Cook v. Parham,* 63 Ala., 456. No grantee can be bound by any judgment in an action commenced against his grantor *subsequent to the grant: Keokuk & W. R. Co. v. State of Missouri,* 152 U. S., 301; *Campbell v. Hall,* 16 N. Y., 575; *Mathes v. Cover,* 43 Iowa, 512; *Bryan v. Malloy,* 90 N. C., 508; *Scates v. King,* 110 Ill., 456; *Dooley v. Potter,* 140 Mass., 49; *Coles v. Allen,* 64 Ala., 98; *Todd v. Flournoy,* 53 Ala., 98; *Shay v. McNamara,* 54 Cal., 169: otherwise a man, having no interest in the property, could defeat the estate of the true owner: *Winslow v. Grindal,* 2 Greenl., 64; *Marshall v. Croom,* 60 Ala., 121; *Cook v. Parham,* 63 Ala., 456; *Hume v. Frazen* 73 Iowa, 25; *Coles v. Allen,* 64 Ala., 98; *Bartero v. Real E. S. B.,* 10 Mo. App., 76. Nor will the fact that a grantee's conveyance *is not recorded* bind him by a judgment against his grantor, in an action commenced *after* the execution of the grant, *unless the statute expressly gives the judgment that effect; Vose v. Morton,* 4 Cush., (Mass.) 27: *Windom v. Schuppel,* 39 Minn., 36; *Smith et al. v. Williams,* 44 Mich., 240, where the question is exhaustively discussed by Judge Cooley. The foreclosure of a mortgage, or of any other lien, is wholly inoperative upon the rights of any person not a party to the suit, whether such person is a grantee—*Brush v. Fowler,* 38 Ill., 58—judgment creditor—*Brainard v. Cooper,* 10 N. Y., 356—attaching creditor—*Lyon v. Sanford,* 5 Conn., 544—or other lien holder—*Smith v. Claimants,* 97 Am. Dec., 531; *Freeman on Judgments* (4th ed.) §162. "It is a general and established rule, that when a party's right may be collaterally affected by a judgment, which for any cause, is erroneous and void, but which he cannot bring a writ of error to reverse, he may, without reversing it, prove it was erroneous and void in any suit in which its validity is brought in question." *Vose v. Morton,* 4 Cush., 27; *Leonard v. Bryant,* 11 Met., 370; *Down v. Fuller,* 2 Met., 135; *Griswold v. Stewart,* 4 Cow., 458:

If Andrews & Whitcomb had not foreclosed their mortgages in the state court, but, after complainant and the intervener had obtained their lien judgments, had commenced suit of foreclosure in this court and had a receiver appointed to hold and operate the property and save it from being lost by sale under the lien judgments during the foreclosure litigation and the lien-judgment creditors had come into the case, all as in *Hassal v. Wilcox,* could it be doubted that Andrews & Whitcomb could, when the lien judgments were offered as evidence,

object that they afforded not even prima facie evidence as against them, of any lien rights in those claiming under them? They would, in such case, stand in precisely the situation the bondholders and their trustee stood in, and the complainant and intervener would stand in precisely the situation Wilcox stood in in *Hassal v. Wilcox*, and the law of that case would rule.

It follows, since the lien decrees pleaded in the amended bill and petition constituted *no evidence whatever of liens* upon the property *as against Andrews & Whitcomb* and their title—Freeman on Judgments, §117—that complainant and R. D. Wood & Co. were in the same position they were before these irrelevant amendments were made. They were still before the court as general judgment creditors with the right to question Andrews & Whitcomb's title only on the ground of fraud or as based upon contracts that were nullities. And they obviously took this view of it, for in April—four months after submission of the case at the hearing in December—they procured the withdrawal of its submission and obtained leave to again reform and reformed the lien issue by stating an entirely new cause of action, viz.: for the foreclosure of their alleged *original lien claims* under the laws of Wisconsin. For the reformed pleadings see pp. 620, 623, Record. This was a clear abandonment of their claims under the lien decrees for it is hardly permissible for a suitor to claim under a decree foreclosing a lien right and also seek a new decree foreclosing the same lien rights *in the same action.*

It was the same as though their causes of action on the lien judgments were formally demurred to instead of specially answered to, as they were by Andrews & Whitcomb, for insufficiency—because the facts pleaded showed the judgments were without evidential force against Andrews & Whitcomb—and the demurrer sustained with leave to withdraw the submission of the case and form new issues by supplemental pleadings if so advised. Had this been done, is it doubtful that the record would have stood purged of the amendments to the bill and intervention petition bringing the claims *on the lien judgments* into the case? An amended bill must be consistent with the original bill: *Story's Eq. Pl.* (10th ed.) § 884, note *a*; *Hill v. Hill*, 53 Vt., 578; *Shenandoah V. L. Co. v. Griffith*, 76 Va., 913; *Rogers v. Rogers*, 1 Paige, 424. To consider the causes of action *on the lien-decrees* as still in the case after the pleadings were last reformed—to obtain *new* decrees of foreclosure *of the same original lien claims*—would be the extreme of inconsistency.

The certain theory upon which this leave was obtained to withdraw the submission of the case and to reform the issues as to the lien claims was that the lien judgments, obtained as they were in suits to which Andrews & Whitcomb were not

parties, being impotent to affect their interest in the property, the lien claimants must proceed in virtue of their *original lien rights* (if any ever existed) in order to stand as lien-claimants in the case. This remained their sole expedient when deprived of the before-relied-upon *prima facie* effect of their lien-judgments by the doctrine of *Hassal v. Wilcox*, *McCoy v. Quick*, and *Cummings v. Taber*, supra.

What resulted? Forced to rely upon the *original lien rights* they were forced, as well, to show every statutory essential to their enjoyment: to proceed upon allegations and proofs primarily requisite for the foreclosure of the alleged liens.

This was undertaken. The supplemental pleadings filed under the order of April 11th were the usual complaints under the statute, for the foreclosure of the statutory lien, with these both vital and fatal differences:

1st: The statute, § 3322, explicitly requires the complaint to set forth, *inter alia*, "a description of the premises claimed to be affected by such lien." No description of *any premises whatever* is given. The allegation is

> "that said pipe was sold and delivered to be used and "actually was used by said defendant in the erection and "completion of a certain well and water-works plant upon "the lands and real estate theretofore purchased and be- "longing to said defendant Oconto Water Company; that "said iron pipe was laid in and upon said real estate, and "also in the streets of said city of Oconto, and connected "with the machinery and apparatus of the defendant, so "as to constitute a complete system or plant for the pump- "ing and supplying of water to the patrons of said defend- "ant Oconto Water Company; that said real estate was "situate within the corporate city of Oconto, and less "than one acre in extent."

Neither the original or supplemental pleadings in this case disclose any description of this real estate. *Nor are the franchises mentioned in this attempt to describe the premises affected.*

2nd: It *could not* be alleged that *this new action* to foreclose the lien-claims (for such the newly reformed pleadings made it, as to Andrews & Whitcomb, since their title was in no way affected by the actions in which the lien-decrees had been obtained or by this action before the pleadings were last reformed) had been commenced within one year from the furnishing of the last material, or that one year had not elapsed since then, so the allegation was—quoted p. 100 of this Brief—

> "and that one year did not elapse after the furnishing of "the pipe aforesaid before the commencement *of a suit* by "said complainant to foreclose the same against the prop- "erty of said defendant Oconto Water Company."

The allegation is meaningless. What suit? What became

it? Were Andrews & Whitcomb parties? It may have failed. Of course, no one doubts *what* suit is meant, but *that* suit went to judgment *two years before*, and, not being against Andrews & Whitcomb, neither they or their title to the property were affected by it.

Proof was made of the commencement of no other suits than those in which the lien-judgments were rendered.

It follows that the reformed pleadings failed to state a cause of action for the foreclosure of any lien rights.

Besides this, Andrews & Whitcomb answered the failure to file the lien claims required by the statute and pleaded the limitation statute of one year to this new bill. The point could have been taken by demurrer but may be by answer as well. *Marshal v. Olds et al.*, 86 Ala., 296 (5 So. Rpr., 506). The answer asks the same advantage as though a demurrer had been interposed; pp. 627, 633, Record.

The limitation statute is not avoided by importing a barred cause of action into an old case by supplemental pleadings and then say of it "it has relation to the time of filing the original bill." This rule—that an amended pleading has relation to the time of filing the original bill—does not apply where the pendency of a suit can affect either the parties to it, or strangers; *Union P. R'y Co. v. Wyler*, 185 U. S., 285. Story states the rule to be:

> "And so far as the pendency of a suit can affect either "the parties to it, or strangers, the matter brought into a "bill by amendment, will not have relation to the time of "filing the original bill; but the suit will so far be con- "sidered as pending from the time of amendment." Story's "Equity Pleadings (10th ed.), § 904, citing Mitford and Cooper. See also *Texas & P. R'y Co. v. Cox*, 145 U. S., 593; *Judson v. Courier Co.*, 25 Fed. Rpr., 705, where it is said:
>
> "A complainant is not at liberty to make a new and "different case by way of amendment. *Shields v. Barrow*, "17 How., 130. But if ordinarily such latitude of amend- "ment might be given, a conclusive reason why it should "not be allowed in the present case is that more than six "years have elapsed, the statutory period of limitation, "*since all the acts appertaining to the transaction were within* "*the knowledge of the complainants.* It is already more than "six years since the original bill was sworn to. Upon an "original bill for the purpose of assailing the transfer to "Howe as fraudulent, a plea of the statute of limitations "is itself a muniment of title, and is available to all who "succeed in interest. If an original bill could not be "maintained after this lapse of time an amendment, equiv- "alent to a new bill, should not be allowed in a case."

See also *Weldon v. Neal*, 19 Q. B. D., 394; *Winston v. Mitchell* (Ala.) 9 Southern Rpr. (West Pub. Co.), 551, where it is said:

"The general rule is that an original and amended bill "form one entire bill, the amendment being regarded as "having relation to the commencement of the suit. True, "when any new matter or claim is introduced, this rule "does not operate to deprive the defendant of the right to "insist upon the statute of limitations, if the bar is com- "plete when the amendment is allowed; but when no new "matter or claim is introduced, the allegations being "varied as to a subject within the *lis pendens*, then the "statute will run only to the filing of the original bill. "*King v. Avery*, 37 Ala., 189; *Adams v. Phillips*, 75 Ala., "461."

There are other objections equally fatal.

That the plant cannot be sold except with the franchises is, it is conceived, a conceded point in the case.

Whether the lien-claims are asserted under the lien-judgments or under the supplemental pleadings filed herein for their re-foreclosure, they are subject, in either case, to valid objections.

The filing of a claim for a lien, in the office of the clerk of the Circuit Court of the county holding the property, that will answer the requirements of the statute, is a fundamental necessity.

"No lien hereby given shall exist and no action to en- "force the same be maintained unless within six months "from the date of the last charge for * * * the fur- "nishing of such material, a claim for such lien shall be "filed as hereinafter provided in the office of the clerk of "the circuit court of the county in which the lands affected "thereby lie." § 3318, Annotated Statutes.

This claim for lien must be of a certain character.

"Such claim for lien shall contain a statement of the "contract or demand upon which it is founded, the name "of the person against whom the demand is claimed, the "name of the claimant or assignee, the last date of the "performance of labor or furnishing of material, *a descrip- "tion of the property affected thereby*, a statement of the "amount claimed and all other material facts in relation "thereto." § 3320, Annotated Statutes.

These acts are, in terms, made prerequisites to the right to maintain an action for the foreclosure of a lien.

"Any person having so filed *such* claim for a lien may "foreclose the same by action in the Circuit Court, or any "county court having jurisdiction thereof." § 3321, Annotated Statutes.

No claim for a lien *upon the franchises* of Oconto Water Company was ever filed by any lien-claimant.

Copies of the only lien-claims filed are attached to the answers of Andrews & Whitcomb to the supplemental pleadings for the foreclosure of the alleged lien-claims herein. The filing of a lien-claim "that complied, in all respects, with the statute" is alleged both in complainant's supplemental bill and in R. D. Wood & Co.'s supplemental intervening petition. These allegations are denied by Andrews & Whitcomb in their answers to these pleadings. This denial put the lien-claimants to proof of the allegation. They made no proof of it whatever. They have nothing to rely upon but the allegations in Andrews & Whitcomb's answers in this behalf, setting forth copies of the instruments actually filed. There is no other evidence in the case upon the subject.

It therefore stands, if the lien-claimants are entitled to the benefit of these allegations, that the only lien-claims ever filed by them were in the words and figures of these copies.

It is submitted to the court that no lien-claimant can have a lien decree, in any event, impressing a lien upon any other property *than that described in the claim for a lien filed.* That the franchises of Oconto Water Company constitute "property" cannot be disputed. They are alienable, taxable, inheritable. Without a lien upon the franchises of the Oconto Water Company the complainants have no lien upon the plant and in the claim for a lien filed by them they make no claim to a lien upon these franchises. They have not referred to them in the lien-claims as property upon which they claim a lien. It was therefore beyond the power of any court to foreclose or decree a statutory lien *upon the franchises* of Oconto Water Company.

If resort is made to the lien decrees rendered in the other cases, an examination of those decrees shows that the *only* property *upon which the lien was adjudged* was the following—the language of the decree in this behalf is noted in full—

> "and that the aforesaid sums are a lien under chapter
> "143 of the R. S. of 1873, of the State of Wisconsin and
> "the acts amendatory thereof, upon the well, buildings,
> "machinery and the entire water-works plant of said
> "defendant in the city of Oconto, Wisconsin, and upon all
> "the right, title and interest which the defendant Oconto
> "Water Company had in and to the premises hereinafter
> "described from and after the date of the commencement
> "of the construction of said well, buildings, machinery
> "and water-works plant upon which said lien is claimed."

No lien whatever was adjudged *upon the franchises* of the Water Company.

How can the property lying under the lien so adjudged be sold? It is the tangible property appertaining and necessary to the enjoyment of the franchises of the company.

A clause of the judgments in the lien cases, succeeding the

one above quoted, although it orders not only the sale of the tangible property upon which the lien is adjudged by the preceding clause, but as well, "the franchise of maintaining and operating said plant for the uses to which it is devoted by the law of the defendant's incorporation as an entirety," does not help out the matter, for it was beyond the power of court, and hence becomes a question open to collateral attack, to decree a sale of any other property than that upon which the decree adjudged the lien, and this vice appearing upon the face of the decree, avoids it *pro tanto* in a collateral proceedings the same as any other instrument, not conforming, upon its face, to legal requirements, is objectionable whenever offered in judicial proceedings as evidence.

Suppose the court in its judgment in the lien cases, after adjudging a lien upon the tangible property composing the plant, had, in the clause ordering sale to be made, ordered the corporate stock of the Water Company to be sold with the plant. Would not that decree, to that extent, be absolutely void upon its face and open to objection, in a collateral proceeding, as the exercise of a power not given the court by the law in virtue of which alone it had authority to proceed at all? If a strictly meritorious lien-claim is foreclosed upon my house, under the statute, and the decree impresses the lien upon the house and orders its sale, but orders as well the sale of my piano and household furniture, upon which the statute does not lay the lien and upon which the court has not adjudged a lien, could that part of the decree ever be interposed in a court proceeding as authority for the sale of the piano and furniture? Could a purchaser at such sale of those articles, in replevin against him by the owner for them, interpose the lien decree and a sale made under it in support of his title? If he did so could not the objection be taken in such proceeding that that part of the decree was absolutely void? Would it be any answer to such objection that such an attack could not be made collaterally, but should have been asserted upon appeal from the judgment in the case in which it was rendered?

Ordering sale of property upon which no lien had been *adjudged* and upon which the statute does not lay the lien was the exercise of a power not authorized by the statute, in a purely statutory proceeding, and was utterly null and void and may be collaterally assailed; *Murray v. A. S. Co. etc.* (C. C. A., 9th Cir.) 70 Fed. R., 341, 346, citing *Griffith v. Frazier*, 8 Cranch, 9; *Elliott v. Peirsol*, 1 Pet., 333, 340; *Wilcox v. Jackson*, 13, Pet., 498, 511; *Bigelow v. Forrest*, 9 Wall., 351; *Windsor v. McVeigh*, 93 U. S., 274, 282; *U. S. v. Wolker*, 109 U. S., 258; *Reynolds v. Stockton*, 140 U. S., 254, 268; *Hatch v. Ferguson*, 15 C. C. A., 201; *Munday v. Vail*, 34 N. J. Law, 419.

Neither complainant or R. D. Wood & Co. offered proofs in

support of any allegation of their supplemental pleadings except the one charging that the lien claimed by each "dated and commenced on the 15th day of Sept., 1890, that being the date of the commencement of the construction of the building, machinery, erection, well and plant of said defendant Oconto Water Company." The evidence consisted wholly of the testimony of Mr. Mullen, who testified to having no other knowledge on the subject than that shown by the Oconto Water Co.'s books and that he knew nothing about the correctness of the entries in the books, not having had anything to do with making them. His testimony was all put in under objection to its competency and also because

"First: It is irrelevant, the amendments to the bill "and its prayer in that behalf having been improperly al- "lowed in this,

"1st. They change the entire form and scope of the "action and the original bill, and

"2nd. The cause of action for the foreclosure of the "lien-claim was barred when application to amend the "bill was made.

"Second: It is incompetent because the statute under "which the lien right is claimed gives no lien upon, and "does not apply to, water-works property like that upon "which the lien is here claimed." P. 941, Record.

The case was re-submitted upon the reformed pleadings and this evidence, Andrews & Whitcomb having offered no evidence upon the new issue, and the allegation by complainant and R. D. Wood & Co. in their supplemental bill and petition that construction work commenced *Sept. 15, 1890*, is supported by *no testimony at all*, Mr. Mullen's testimony, incompetent as it is, *and the only testimony in the case upon the subject*, fixing it not earlier than *Sept. 16th*.

As to the Standing of the Case upon its Re-submission.

Upon re-submission of the case neither complainant or R. D. Wood & Co. had shown ownership of any lien-rights in or upon the water-works plant or franchises, because

First: Their lien decrees against Oconto Water Company were without evidential force as against Andrews and Whitcomb, because

1st: They were rendered in actions to which Andrews & Whitcomb were not parties:

2nd: They do not purport to adjudge liens upon the *franchises* of the water company or upon any property except *the tangible property composing the plant*, and, as the *franchises* could, in no event, be decreed to be sold unless the decrees extended the liens over *them* as well as the *plant* and as the plant

could not be sold apart from them, the decrees are void upon their face, and

3rd: By obtaining withdrawal of the first submission of the case and reforming the *lien-issue* so as to claim under the *original* lien-rights, they must, for inconsistency, be held to have abandoned all claims under the lien decrees.

Second: They failed to state in their reformed pleadings or prove under them

1st: Any description of the property upon which they claimed a lien:

2nd: That the action to foreclose the alleged lien was commenced within one year from the date of furnishing the last material as required by the Wisconsin statute:

3rd: That a claim for a lien was ever filed as required by the statute:

4th: They failed to prove the date of the commencement of the construction of the water-works plant.

Third: The cause of action for the foreclosure of the pretended *original* lien-rights, stated in their reformed pleadings, was barred by the one year statute of limitatians requiring actions for the foreclosure of liens under the statute to be commenced within one year from the date of furnishing the last material.

As to the Situation of Complainant and R. D. Wood & Co., Upon Re-submission of the Case.

If the foregoing views are correct, complainant and R. D. Wood & Co. had, upon re-submission of the case, failed to show ownership of any lien upon the water-works plant and franchises and, unless they had succeeded in showing the instruments under which Andrews & Whitcomb made title thereto to be void for fraud or nullities for defective execution or want of power in the Water Company to make them, Andrews & Whitcomb were entitled to have the bill dismissed as to them.

Upon the fraud issue the trial Court found and so adjudged

> "That said instruments executed in the name of the "Oconto Water Company to said defendants Andrews & "Whitcomb were made in good faith and for a valuable "consideration and were not withheld from record by "their procurement nor with their consent nor in fraud of "creditors:" Par. *Thirteenth* of Decree, page 674, Record.

Upon the subject of the *effect* to be given those instruments all that was said by the trial court was said of the Menasha agreement, and that, upon the priority-of-lien issue, not yet discussed. Its view of that instrument was that, because it was not, by previous resolution, authorized by the board of directors, or sealed with the corporate seal, or delivered until Sept.

15th—which date it held to be the date of the commencement of the construction of the plant and hence the date when the mechanic's liens attached—or ratified until Oct. 29th, it created a lien inferior and subordinate to the liens of complainant and R. D. Wood & Co., as established by their lien decrees, which decrees it held to be "valid and effectual" and ordered them enforced according to their terms: Par. *Third*, Opinion, p. 713, and Par. *Fourth* of Decree, p. 672, Record.

It has already been seen that the case was purged of all claims under the lien decrees, by the reformation of the issues, as to the lien claims, under the order of April 11, 1895. It has also been seen that the lien causes of action stated in the supplemental pleadings filed under that order were not only insufficient but barred by the statute of limitations.

By what course then were the lien decrees again resorted to? A very circuitous and ingenuous, but, if not erroneous, a very fatal one to Andrews & Whitcomb, for, by it not only is every dollar loaned by them to the Water Company put in peril of total loss by the subordination of their liens to the lien-decrees of complainant and R. D. Wood & Co., but a personal liability to the extent of one hundred thousand dollars to the creditors of the Water Company—if its debts should amount to that sum—is adjudged against them, in addition; and all because, in the judgment of the trial court, equity required—notwithstanding the law, and the rule of its administration—that the water-works plant and franchises be subjected to liens in favor of the lien claimants herein, and in no other way could this be accomplished; and this was the course: Andrews & Whitcomb, notwithstanding their contracts, were held to be *stockholders* of the Water Company and, as such, within the doctrine of privity, concluded by the lien decrees obtained against it, and, being stockholders of unpaid stock to the amount of one hundred thousand dollars, it followed, as an inevitable consequence, and was so adjudged—Par. *Sixth* Decree—that they were liable to creditors to that extent, and a personal judgment was rendered against them in favor of every unsecured creditor who had proved a claim against the Water Company herein, for the amount of the claim as proved, and a personal judgment against them ordered in favor of complainant and R. D. Wood & Co. for any deficiency that might remain unsatisfied by a sale of the water-works plant and franchises under their lien decrees.

Of course if the case was purged of all lien claims *under the lien decrees* by the reformation of the issues under the order of April 11th, as claimed by appellants, the trial court was outside of the record when it resorted to those decrees afterwards, and this error alone is fatal to the decree appealed from.

Appellee's first contention in this proceeding, viz.: that the court of appeals should have dismissed these appeals for want of jurisdiction for non-joinder of other defendants, is here made for the first time.

After the appeals were perfected to the court of appeals, appellees moved that court to dismiss on the sole ground that the appeal was not final.

The motion was denied: 19 C. C. A., p. 548.

The contention now is that the appeals should have been dismissed because the decree was a *joint* decree and there was neither joinder of or severance as to the other defendants.

The decree was not a joint decree.

That part of it appealed from by Andrews & Whitcomb and Oconto City Water Supply Company affected them alone. It was not against them and others jointly with them. They alone had an interest in having it reversed. It annulled their title to the Water Works plant and franchises and adjudged them personally liable to the other creditors. Nobody else had an interest in having the decree in these particulars reversed but themselves.

The same is true as to those parts of the decree appealed from by the appellant, City of Oconto.

These appeals fall within the rule of *Forgay v. Conrad*, 6 How. (U. S.), 201; *Simpson v. Greely*, 20 Wall. (U. S.), 157; *Milner v. Meek*, 95 (U. S.), 252; *Todd et al. v. Daniels*, 16 Pet., 521; *Brewster v. Wakefield*, 22 How. (U. S.), 125.

The defendants not appealing, who had appeared in the case, all appeared by the same counsel who has represented appellants throughout this litigation.

Only the appellants, Andrews & Whitcomb, answered in the case. The decree was taken *pro confesso* as against all of the other defendants. In such case the defaulted defendants could not, against the objection of appellants, become parties to the appeal: *Marsh et al. v. Nichols et al.*, 120 U. S., 598.

It is true that the appeal papers refer to several of the intervening creditors against whom the appeal was taken by the name of their firms rather than by their individual names, but the record in the case discloses the individual names in each case: p. 112 for Dickinson Bros. & King; 113 for Cook & Hyde; 119 for R. D. Wood & Co., and 140 for Sherwood, Sutherland & Co.

This is sufficient within the rule of *Estes v. Trabue*, 128 U. S., 225.

The other objections made to the appeals were all included and disposed of by appellee's motion to dismiss the appeals in the court of appeals on the ground that the decree was not final. The authorities upon which the court of appeals denied the motion are all cited in the opinion of that court and are here referred to.

As to the Heresy that Andrews & Whitcomb were Stockholders of Oconto Water Company.

First. They were not thus liable *to the corporation.* By its plain written contract, the stock was pledged to them for a corporate debt, and was to be returned to the corporation when the debt was paid. (Case 38, 79.) In the face of that contract, the corporation could not claim that the pledgee was liable as absolute owner of the stock.

Gasquet vs. Brewing Co., 49 Fed. Rep., 496.
Burgess vs. Seligman, 107 U. S., 20.
Union Nat. Bank vs. Seligman, 92 *Mo.*, 635.
R'y Co. vs. R'y Co., 59 N. H., 385.

In *Burgess v. Seligman*, stock was pledged in the same way. The court said: "The proposition that the corporation could hold them (pledgees) as subscribers to its stock, would be in flat defiance of the contract, in whole and in every part. We do not know of any iron rule of law which would prevent them from showing this contract relation *between them and the corporation. It is the origin and foundation of their whole connection with it.* * * * It shows * * that, as *between them and the company,* the latter has no claim whatever against them in relation to the stock, except *to have it returned* when properly required, after the purpose of its issue had been accomplished." 107 U. S., 30.

It matters not that part of the stock was first issued to Garland and Todd, by them surrendered, and re-issued to the pledgees. Whether this was a transfer by Garland and Todd or an original issue by the corporation, it was still delivered in *pledge for a corporate debt under a contract with the corporation,* which precludes a claim by *it* that the pledgees thereby agreed to pay for the stock.

In this particular they were again in precisely the same position the Seligmans were under their contract, of which the court said:

> "Upon a careful examination of the facts found in this
> "case we do not see how a reasonable doubt can exist that
> "the Seligmans held the stock in question as trustees and
> "custodians by way of collateral security for themselves
> "and the purchasers of the bonds. That was clearly the
> "intent of the parties, declared in almost so many words;
> "and that intent must prevail unless, by some inadvertence
> "in carrying it out, the Seligmans have been unwittingly
> "caught in some legal snare of which the creditors can
> "take advantage."

And further, speaking of the terms of the contract:

> "The terms used may not have been strictly technical.

"The issuing of the stock in their names may not have "been a 'deposit' or an 'escrow', in the strict sense of those "words, but the intent is very clear that the stock was not "to be regarded as their stock, but as belonging to the "company, though in their names, and that it was to be "held by them simply as a security."

Next, Section 1753 R. S. Wis. provides: "No corporation shall issue any corporate stock or certificate of stock, except in consideration of money, or labor or property estimated at its true money value, actually received by it, equal to the par value thereof * * * *, and all stock * * issued contrary to the provisions of this section * * * *shall be void.*" The *corporation* cannot enforce this stock as unpaid: for, to do so, it must show a violation of the statute *by itself*, which makes the stock void.

Bank vs. Owens, 2 Pet., 527.
Melchior vs. McCartney, 31 Wis., 252.
Irwin vs. Williar, 110 U. S., 499.
Scovil vs. Thayer, 105 U. S., 143.
Pfister vs. Mil R'y Co., 83 Wis., 86.

Under this statute the trial court held the Water Company's *bonds* issued to Andrews & Whitcomb under the contract of September 13th, to be *an absolutely void issue* and ordered them surrendered to its clerk for cancellation, solely because they were issued before 75 per cent. of their par value was received by the company for them. Yet, by the same decree it finds that the entire capital stock of the company was issued to Andrews & Whitcomb *for nothing*, that it became a valid issue, and their stock, and made them liable for its par value precisely as though they had subscribed for it or succeeded to the obligations of a subscription contract, all on the following theory: It seemed to the trial court—because "at the commencement of and during the pendency of "the mechanics' lien suits, Andrews & Whitcomb were the holders, though "as collateral security," of the stock then standing "in their names on the books of the Company" and "actually controlled the business of the corporation" (as evidenced by the fact, shown by the Company's letter-book, that Mr. Andrews conducted the correspondence sometimes in his own name, sometimes in the name of the corporation") and "actually participated in, and, in fact, controlled the policy and operations of the Company at and after the commencement of the lien suit" and because "the employment of counsel (who "was at the time and since has been the counsel of Andrews & Whitcomb") to defend that suit, if not actually authorized by them, could not, under the circumstances having been unknown to them and unapproved by them"—that these circumstances constituted Andrews &

Whitcomb "stockholders so far as to conclude them by the (lien) judgment rendered against the company" and that "they are not in a position to attack that judgment collaterally;" Opinion, fol. 967, pp. 710, 711, Record; and further: that the elimination of Garland from the Water Company and the assignment by him of his equity in the stock to Sturtevant and the prompt election of the latter to the presidency of, and also, with Ford, to a directorship in the company upon its reorganization in Jan'y, 1891, were acts that constituted them—Sturtevant and Ford—"mere dummies in the enterprise, acting in the interest of Andrews & Whitcomb" done "to give the latter full control of the management of the corporation, which they thereafter exercised" and that "by this transaction Andrews & Whitcomb became the absolute owners of the stock;" Opinion, fol. 874, pp. 714, 15, Record.

As to the Acts of Participation In, and Control Over the Business, Policy and Operations of the Water Company by Andrews & Whitcomb.

In what way did Andrews & Whitcomb participate in the business or exercise any control over the policy and operations of the company after the reorganization of the company Jan'y 12th and the commencement of the lien suit Jan'y 30, 1891? In this way only: because on the 17th day of Jan'y they had, in order to obtain from the City of Oconto an extension of the time in which to complete the plant, engaged to pay off the existing debts of the Water Company to its creditors in Oconto, all that they did after that, prior to the making of their contract of March 13th, 1891, with the company—their second mortgage—was to pay those debts out of their own funds. By the express terms of the contract of March 13th, they reserved the right to be consulted with regard to the purpose and necessity for the expenditure of every dollar of the $12,000 which by that contract they obligated themselves to loan the company, and Mr. Andrews remained on the ground for that purpose, and after April 3, 1891, conducted a portion of the correspondence of the company as shown by the stipulation in folio 611, pp. 670–1, Record. They reserved the same right under the contract of May 16, 1891—their third mortgage—and in exercising the right Mr. Andrews continued to conduct in part the correspondence of the company. The letter-book shows the correspondence to have been solely in connection with the making of purchases of material and payment for it and other transactions necessary for the only business and policy the company had during all this time, viz.: the completion of the plant, and Andrews & Whitcomb had been forced, by the refusal of the other creditors to do anything whatever in that direction, to engage, to the extent stated, in the identical

acts that operated, in the judgment of the trial court, to bar them from questioning the lien decrees.

Not a word in the case shows that Andrews & Whitcomb had anything whatever to do, or were in any way connected with the lien suits. That they knew those suits were being defended may be assumed under the circumstances, but if they knew this and approved of it, it is incredible that any court should say that that would be sufficient to bar them, who were mortgagees of the property and not parties to the actions, from questioning the judgments whenever they came into antagonism with their mortgage interest.

Nor does the case show that Andrews & Whitcomb had anything whatever to do with the employment of counsel to defend those actions, but if they had, it would not have made them a party to the suit or bound them by the decree. The precise question was raised and so decided in *Stryker v. Crane*, 123 U. S., 527; see last clause of Opinion.

The conclusions of the court that Garland's assignment of his equity in the stock to Sturtevant, and Sturtevant and Ford's entry into the company at its reorganization was done "to give the latter (Andrews & Whitcomb) full control of the management of the corporation" and that Sturtevant and Ford were "mere dummies in the enterprise, acting in the interest of Andrews & Whitcomb," and that "by this transaction Andrews & Whitcomb became the absolute owners of the stock," are unsupported by fact or law. All of the testimony and facts bearing upon this part of the case are fully set forth in paragraphs *Forty-third* and *Forty-fourth* of the Statement of Facts, of this brief, and it is submitted that the conclusion expressed thereon is literally justified by the only evidence in the case on the subject. If so, Sturtevant and Ford were brought into the corporation for no other purpose than to provide a management *in the interest of all of the creditors alike* and free the company from further danger of Garland's incapacity, and the proof of this is that, at once upon the new management obtaining control, it did everything that possibly could be done to bring about an arrangement just and fair to all the creditors, which Andrews & Whitcomb encouraged and forwarded to the utmost, going even to the extremity of offering to waive their lien rights in the property of the company if the creditors would participate, on a *pro rata* basis, in the completion of the plant. In other words, the way the dummies acted in the interest of Andrews & Whitcomb was to seek just contribution from all the creditors, Andrews & Whitcomb with the rest, of funds enough to complete the plant on the basis of waiver by Andrews & Whitcomb of all lien rights over, and joint ownership, in just proportion, by all creditors, of the property. Could anything have been more

fair? What other plan or scheme for saving the property and preserving it from worthlessness could possibly have been as fair to all concerned? For the facts see Par. *Fifty-fifth*, Statement of Facts of this brief.

By coming into the company as they did—Sturtevant as assignee of Garland, and Ford, of Elkins—they stood in the shoes of their assignors. Neither the company nor its creditors were adversely affected by the change, for there remained a full liability on the stock subscription contract—*Northwood Union Shoe Co. v. Pray* (Sup. ch. N. H.) 32 Atl., 177—and the legal title to the stock *was in the company*, for Andrews & Whitcomb were *then* the *registered* pledgees of the stock and the company was the pledgor. The legal title of a pledge is always in the pledgor: *Cook on Stock etc.* (3rd ed) § 463; *Heath v. The S. L. M. & S. Co., 39 Wis.*, 147, 157-8. At this time, if Andrews & Whitcomb had been paid off, the stock would have been returned to the company—*Heath v. The S. L. M. & S. Co. et al., Supra*—and could not have been issued to the subscribers or their assignees *until fully paid for;* § 1753, S. & B.'s Stats. The creditors therefore were not adversely affected by the assignment to Sturtevant and Ford, without consideration, of the equity assigned them in the stock; *Anderson v. Phila. W. Co.*, 111 U. S., 479.

The trial court says—p. 715, Record—

> "Neither Sturtevant nor Ford paid any consideration for "the stock; they were mere dummies in the enterprise, "acting in the interest of Andrews & Whitcomb, and the "transfer was made to give the latter the full control of "the management of the corporation, which they thereafter "exercised. By this transaction Andrews & Whitcomb be- "came the absolute owners of the stock."

This conclusion, it is conceived, is wholly erroneous.

In the first place, in the absence of evidence of actual fraud or bad faith, the mere pledgee of stock, where he is not registered *as owner*, may protect himself from liability, may save himself from being charged as a stockholder by using a dummy; *Anderson, receiver, etc., v. Philadelphia Warehouse Co.*, 111 U. S., 479; *Cook on Stock etc.*, § 247; *Henkle v. Salem M. F. G. Co.*, 29 Ohio St., 547; *Welles v. Larabee*, 36 Fed. Rpr., 66; *Newry etc. R'y Co. v. Moss*, 14 Beav., 64; *Prouty v. Prouty, etc., Co.*, 25 Atl. Rpr., 1001; *Day v. Holmes*, 103 Mass., 306; *Heath v. Griswold*, 5 Fed. Rpr., 573; *Cook on Stock etc.*, (3rd ed.) § 466; *Pauly v. State L. & T. Co.*, 56 Fed. R., 430.

If Andrews & Whitcomb were the real owners of the stock instead of pledgees, the rule would be different. They could not then use a dummy to escape liability.

But it is idle to discuss the case on the theory that Sturtevant and Ford were dummies of Andrews & Whitcomb in any

sense, since Sturtevant came into the company as the choice of Garland, assented to by Andrews & Whitcomb, recommended by his recognized ability, experience and integrity, to bring, with the aid of those qualities, if possible, order out of chaos and effect the completion of the plant with economy and dispatch, and an arrangement with all the creditors that would secure to each, ownership of an interest in the entire property in proportion to his debt, without preference in any, Andrews & Whitcomb standing ready and anxious to aid, to the utmost, the accomplishment of these ends.

If this made Sturtevant a dummy and Andrews & Whitcomb the absolute owners of the stock, a new doctrine has been born to the law of stock corporations.

The fact is, unless it was lawful for the company to issue the stock as it did to Andrews and Whitcomb as a pledge to secure payment of a loan *for less than its par value*—in which case there could be no liability (for the want of a promise) to pay the difference—the issue was and continued to be a void issue for all purposes. The effect was as though *it had never been issued*. If so, in the absence of an estoppel, only those could be liable as stockholders *who were stock subscribers, or those upon whom the burden of the subscription contract descended*. It by no means descended upon Andrews & Whitcomb. Under their contract with the water company, so far as it relates to the stock, they were in precisely the same situation the Seligmans were under *their* contract—a similar one—with Memphis, Carthage & Northwestern R'd Co., (under which 70,000 shares of *treasury* stock were pledged to them *as pledgees of the corporation*) of whom, and the stock, the court said

> "They never subscribed for the stock; they never "became indebted to the company for it; the company "*never acquired any right to demand* from them a single "dollar on account of it."

In *Heath v. The S. L. M. & S. Co. et al.*, 39 Wis., 146, where a corporation had pledged, as collateral security for the payment of its note, 7,000 shares of its unissued stock, it was claimed by the company, when the note was sued, that the plaintiff—the pledgee—was bound to accept the stock at the rate of three cents on the dollar of its par value in payment of the amount due him on the note, the supreme court said,

> "It is not shown that there was any agreement or "understanding to that effect between the parties, and in "the absence of such an agreement we know of no prin- "ciple of law which compels him to purchase the stock. "The stock doubtless belongs to the corporation after the "mortgage debt is paid. It is also suggested that the "plaintiff has converted the stock to his own use, because "he voted upon it at some of the meetings for the election

"of directors. We do not think that act was attended with "any such consequences. It is clear that the plaintiff had "the right to retain possession of the stock. The president "of the company testifies that he knew that the plaintiff "held stock as collateral security for the payment of the "mortgage debt; and he practically admits that he "requested the plaintiff to be present at the stockholders' "meeting in November, 1870, and vote upon his stock. "But even if the act were unexplained, yet we are unable "to perceive any ground for saying that voting upon the "stock under the circumstances amounted to a conversion "of it": pp. 147-8.

Whatever may have been the method pursued to put the stock in Andrews & Whitcomb's name and possession—See Par. *Thirty-first*, Statement of Facts, of this brief—it cannot be gainsaid that the contract of September 13, 1890, is the only evidence of, and defines the only right they ever had or claimed to have to the stock. That contract defines their relation to the stock to be pledgees, the pledgor being, not Garland, Todd *or any stock subscriber*, but Oconto Water Company.

The stock being void, its issuance and transfer, *as between the parties*, were nullities, and the corporation must rely on the subscription.

Second. The complaining creditors have no better right than the corporation. "Except where *elements of estoppel* supervene, the general rule is that the stockholder is not liable to creditors after the insolvency of the corporation, unless the circumstances are such that he would have been liable to the corporation itself." 3 *Thompson Com. on Law of Corp.*, §§ 2933, 2935.

Burgess vs. Seligman, 107 U. S., 20.
Handly vs. Stultz, 139 U. S., 417, 436.
Coit vs. Gold Amalgamation Co., 111 U. S., 343.
Union Nat. Bank vs. Seligman, 92 Mo., 635.
Bank vs. Gustin, etc., Co., 42 Minn., 327.
Christiansen vs. Eno, 106 N. Y., 97.

The pledgees here are not estopped unless (1) by words or conduct they made some misrepresentation, (2) on which the complaining creditors rightfully relied (3) to their injury. And the estoppel must be alleged either by averring the ultimate fact that defendants are estopped from denying, or the circumstances from which the estoppel arises.

Clansen vs. Jones, 100 Ind., 123.
Anderson vs. Hubbel, 93 Ind., 570.
Warder vs. Baldwin, 51 Ind., 450.
Bigelow on Estoppel, § 709.

The bill avers that this stock was issued in pledge for a corporate debt, but does not aver that any creditor gave credit or did or omitted anything in the belief that the pledgee was absolute owner, or was in any manner injured or affected by acting on such belief. It is certain that there was no misrepresentation, action on the faith, or injury.

1. There was no misrepresentation. The pledgees lived in Maine. They had a plain written contract *with the corporation* for the pledge of the stock *for a corporate debt.* The contract was made in good faith to secure an honest debt. The pledgees receipted for the stock as delivered in pledge under the contract. The contract and receipt were of corporate record. It was the duty of the corporation to place the pledge in the pledgees hands, as it had agreed to do. If that involved entries on the stock registry of the corporation, it was the duty of the corporation to make the record correspond with the fact. The absent pledgees could assume that this would be done. Had the corporation shown by the registry, from the time the stock was issued, that it was issued as collateral for a corporate debt, or any debt, there could have been no estoppel, because no misrepresentation, and the pledgee would not have been liable as a stockholder.

Pulley vs. State Loan and T. Co., 56 Fed Rep., 430.
Pulley vs. State Loan and T. Co., 58 Fed. Rep., 666.
Beall vs. Essex Savings Bank, 67 Fed. Rep., 816.
Bank vs. Seligman, 92 Mo., 635.
Burgess vs. Seligman, 107 U. S., 20.

The corporation failed, for some 60 days, to make the fact of pledge appear on its stock book. The misrepresentation, if any, was by the corporation; and the pledgees cannot be estopped by it.

2. No creditor relied on any representation that the pledgees were stockholders. When creditors and stockholders are numerous, it is, in some cases, under some statutes, presumed that credit was given on the faith of stock liability appearing from the stock book, when it was given. But here there are only six creditors pursuing a single alleged stockholder; and neither of them could have given credit on the belief that such stockholder owned, or was liable upon, any stock. The stock was issued on Oct. 18, 1890, and on December 15th the stock registry was made to show that it was issued "merely as collateral." Credit was given by the six complaining creditors at the dates and for the amounts following:

	Date.	Am't.	Page of Case.
Appellee	Aug. 28, 1890	$22,483.41	167, 352, 357, 358
R. D. Wood & Co.	Sept. 17, 1890	2,894.18	119
Chapman Valve Mfg. Co.	Sept. 17 and Oct. 4, 1890	785.93	115
Dickinson Bros & King	Dec. 29, 1890, and Feb. 4, 1891	341.63	112
Cook & Hyde	Jan. 10, 1891	85.00	113
Sherwood, Sutherland & Co.	Between Sept. 29, 1890, and Jan. 30, 1891	790.22	140, 142

The first three debts, amounting to $26,163.52, out of a total debt of $27,380.37, were contracted before any stock was issued to Andrews and Whitcomb; the next two $426.63 were made after the stock-book showed the pledge; and about $200 of the last debt was for work done between the issue of the stock and the entry that it was issued as collateral. Neither of the creditors examined the stock-book or heard or supposed that the pledgees were stockholders. They do not appear to have known of the existence of Andrews and Whitcomb until Dec. 6, 1890, when Appellee heard they "were *furnishing money for the company.*" (Case 354.)

If they had examined the stock-book, while it failed to show that the stock was pledged, they could not have relied on any liability of Andrews and Whitcomb for unpaid stock. Sec. 1756 R. S. Wis. provides: "If any stock shall be transferred which is not fully paid, the corporation may, *by agreement to be noted on its stockbook*, discharge the stockholder making such transfer from liability to it for the unpaid part of his stock subscription, and accept that of the person to whom the stock is transferred in his place; but the person *transferring such stock shall be liable for the amount unpaid thereon* to the *then* creditors of the corporation and *those who may become such within six months after such transfer*, or to any lawfully appointed receiver or assignee of the corporation for their use." No such agreement was noted or made. The contract of pledge forbid such tradition of liability. An examination of the stock book would have shown that the subscribers only were liable for unpaid stock. The statute was made for such and similar cases. Transferees are often ignorant that stock is unpaid, and often take it in such a way or capacity that they should not be liable to pay. Subscribers sometimes transfer their stock to irresponsible parties. For the protection of all, the corporation can hold the subscribers and cannot hold the transferees, until the agreement specified is made and noted.

3. There can be no injury to these creditors from holding the transfer a pledge. The debts of all the complaining creditors were made *when the stock was issued* to Andrews and Whitcomb *or within six months thereafter*. By the last paragraph of section

1756, just quoted, the subscribers to the stock remained liable to pay for it, as if no pledge or transfer had been made. In *Pullman vs. Upton*, 96 U. S. 328, relied on below, the court said: "The creditors of the bankrupt company are entitled to the whole capital of the bankrupt, as a fund for the payment of the debts due them. This they cannot have if the transferee of the shares is not responsible for whatever remains unpaid on his shares; for, *by the transfer on the books of the corporation the former owner is discharged.*" Many things distinguish that case from this; but the failure of its reason, by force of the statute is enough. The court below said: "Garland and his co-subscribers *were discharged from liability to stockholders* [*creditors*], upon transfer of their stock to Andrews and Whitcomb, and, unless the latter be liable, the recourse of creditors would be gone, a result which the law would not favor." 68 Fed. Rep. 1013. But, by the statute, the subscribers were not discharged. The recourse of no creditor was affected.

However unpaid stock is issued or transferred, whether as a bonus to shareholders, in excess of constitutional or statutory restraint, on condition that it be deemed full paid, or in pledge for corporate or individual debts,—if the holder is not liable for the amount unpaid *to the corporation*, he is not liable for it to its creditors, unless they have been *specially misled* to their injury.

Burgess vs. Seligman, 107 U. S., 20.
Anderson vs. Warehouse Co., 111 U. S., 479.
Handley vs. Stutz, 139 U. S., 417.
Wells vs. Larabee, 36 Fed. Rep., 866.
Pulley vs. State Loan and T. Co., 56 Fed. Rep., 430.
Pulley vs. State Loan and T. Co., 58 Fed. Rep., 666.
Beall vs. Essex Savings Bank, 67 Fed. Rep., 816.
Savings Ass'n v. Seligman, 92 Mo., 635, 15 S. W. Rp., 630.
Christianson vs. Eno, 106 N. Y., 97.
Bank v. Bank, L. Rep., 6 Q. B. 196.
Bank vs. Gustin, 42 Minn., 327.

A share of the stock of a corporation is a share of its net assets and profits. It is property. The certificate or transfer of a share is evidence of title to it. The evidence is not conclusive. It may be shown, unless there is an estoppel, that the holder of the certificate, like the vendee in a bill of sale, is a mortgagee or pledgee. Title may be proved in such case, by parol. And in all cases, the true title may be shown by proof of a grade equal to, or higher than, that of the certificate. The title to this stock is established by the *written* and *sealed* contract of the corporation and by the *record* of the action of its stockholders and directors.

The Wisconsin decisions cited for appellee, holding pledgees of stock, where the stock stood in their name, liable as stockholders, and all the other decisions cited upon the question show that the pledgees, held as stockholders under such circumstances, were pledgees *of the subscribers to the stock* or their assignees and not *of the corporation itself.*

There is a clear distinction between cases where the unpaid stock is issued or transferred in pledge by some contract with the corporation itself for its benefit, and cases where it is so transferred by contract between a stockholder and his assignee, with which the corporation has no connection. In the former class of cases, the corporation cannot claim that the holder of the stock is estopped from denying a liability which the corporation, by its contract, is precluded from asserting. Of this class are *Burgess vs. Seligman, Savings Ass'n vs. Seligman, Christiansen vs. Eno* and others, above cited. In these cases, when the corporate contract appears, "there is," the court says in the Burgess case, "an end of the application of estoppel, unless it can be invoked by some party *specially misled* by the conduct of the defendants." These six creditors seek to enforce a liability to the corporation when, in truth, there is none. They must show that they were "*specially misled.*" They do not claim it. It is demonstrated that they were neither lured astray, nor injured nor affected by the transfer, or by the failure, for a time to enter it correctly on the stock book.

In the second class of cases above noted, where the corporation is a stranger to the transaction whereby a transfer, absolute in form on the books, is in truth in pledge or trust, the corporation itself or its receiver or assignee may claim an estoppel. It acts for creditors and stockholders, and is often required to act on the basis that the stock liability which constitutes, in whole or in part, its resources, is what the books show it to be. It is not necessary in such cases to show that particular creditors were "specially misled." The cases of *Pullman v. Upton*, 96 U. S., 328, and *Bank v. Case*, 99 U. S., 631, cited by the court below, fall within this class. They were suits by receivers or assignees to enforce stock liability. The receiver or assignee represents the corporation only and can only recover when it could.

Scott v. Armstrong, 146 U. S., 499.
Bouton v. Demert, 123 Ill., 142.
Ins. Co. v. Smigert, 135 Ill., 150.

Even in such cases, if it is demonstrated that neither the corporation nor its creditors have acted on the faith that the apparent relation of the transferee is the real one, and that denial of his liability cannot injure, there is no liability.

Anderson vs. Warehouse Co., 111 U. S., 479.

Pauly v. State L. & T. Co., 56 Fed. Rep., 430; 58 do, 666.
Beal vs. Essex Savings Bank, 67 Fed. Rep., 816.
Welles v. Larabee, 36 Fed. Rep., 866.

In *Wells vs. Larrabee*, the court said: "There is no principle of law or equity which justifies the holding a person liable as a stockholder in a corporation if, in fact, he is not one [a pledgee] unless he has *knowingly* permitted his name to appear as a stockholder, and thereby presumably misled parties dealing with the corporation." 36 Fed. Rep., 868. In the Anderson case: "As between the company [pledgee] and the bank or its creditors, the company was pledgee of the stock, and liable only as such. The creditors were put in no worse position by the transfers that were made than they would have been if the stock had remained in the name of Kern or Blumer and Co. [pledgees], who were always *the real owners*." 111 U. S., 479. It is so here. If the stock had remained in the names of Garland and Todd they would have been liable to creditors for their subscription; and, by the statute, they remained liable after the transfer. In *Handley vs. Stutz*, 139 U. S., 417, it was held that creditors whose debts were prior to a gratuitous distribution of stock among shareholders, had no equity to compel payment, because "it is only those who could, *by any legal presumption, have trusted the company on the faith of the increased stock*" who could be injured. In *Sleeper v. Goodwin*, 67 Wis., 592, the liability was *not for unpaid stock*, but, by statute, to employes only, for wages. Section 1756 was inapplicable. The corporation had no connection with the pledge. The stock was in the name of the pledgees as absolute owner while the wages were being earned.

Burgess v. Seligman, 107 U. S., 20, marks the distinction between the two classes of cases. Stock was pledged by the corporation to secure its debt by a written contract. A statute of Missouri provided that a holder of stock, as collateral, should not be liable as a stockholder. The court held the pledgee within the statute, but discussed the question of liability aside from the statute. It said: "In cases in which *the corporation itself has no just right to enforce payment*, and where no bad faith or fraudulent intent has intervened, it may be doubted whether creditors have any better right, unless by force of some express provision of statute * * * *. The line of authorities usually quoted to show that those who actually hold stock, and who manifest a voluntary or intentional holding by voting on it, or receiving dividends or other benefit from it, [are liable] consists mainly of cases in which parties have been held as corporators or associates *as between themselves and the corporation* or

joint stock association, and *as such* incidentally liable to the creditors of the company * * * *. In the present case, the relation of J. and W. Seligman and Co. *to the corporation* is expressly settled and fixed by the written contract between them. * * *. The proposition that the corporation could hold them as subscribers would be in flat defiance of the contract in whole and in every part. * * *. As between them [pledgees] and the company, the latter has no claim whatever against them in relation to the stock except to have it returned when properly required, after the purpose of its issue had been accomplished. It belongs to the company, and to it alone. J. and W. Seligman are mere trustees or custodians of it for a special purpose, that purpose being collateral security. * * *. And when this fact is once clearly established, there is an end of the application of estoppel, unless it can be invoked by *some party specially misled by the conduct of the defendant.*" It was further said in the same case:

> "Did the 60,000 shares of stock belong to them or did "they hold it by way of trust or as collateral security for "the fulfillment of the company's obligations in relation "to the bonds? The courts in England and some in this "country have gone very far in sustaining a liability for "unpaid subscriptions to stock against persons holding the "same in any capacity whatever, whether as trustees, "guardians or executors, or merely as collateral security. "It cannot be denied that in some cases the extreme length "to which the doctrine has been pushed, has operated very "harshly; *and in cases in which the corporation itself has no "just right to enforce payment, and where no bad faith or fraudu-"lent intent has intervened, it may be doubted whether creditors "have any better right unless by force of some express provision of "a statute.*"

In a case arising from the same transaction, the supreme court of Missouri receded from its former ruling, and followed that of the federal court. The court said: "As long as they [pledgees] held the stock under that agreement, doing no other act, their liability to creditors depended upon their legal relation to the company. If stockholders between themselves and the corporation, they would be liable as such to creditors of the corporation; otherwise not. * * * *. The cases cited in the opinion delivered by this court, in the case of *Griswold v. Seligman*, 72 Mo. 110, are all cases in which the facts were such that the persons sought to be charged as stockholders were held to be stockholders, *as between them and the corporation.* In many of the cases suits were instituted by the corporation against individuals, alleging that they were, and seeking to charge them as, stockholders. In none of the cases cited in that opinion was there, as in this, a special agreement, showing

exactly what relation the parties, alleged to be stockholders, bore to the corporation. * * * *. Will the law, from the acts of the Seligmans in evidence, imply a contract radically different from that contained in the written agreement between them and the corporation? Will it hold them as stockholders, in a controversy between them and the corporation, because they voted the stock which they held as collateral security for bonds of the company and for advances of money to the company, whether that stock was legally or illegally voted? If, supposing they had a right to do so, they voted the stock, shall they for that be held to have incurred an indebtness of $6,000,000, *when they supposed they were protecting a demand* they had against it for only $700,000." *Union Savings Ass'n v. Seligman*, 92 Mo. 635; 15 S. W. Rep., 630.

The stock subscription contracts were not discharged or affected by the corporation pledging all of its stock to Andrews and Whitcomb to secure their loan to it; *Northwood Union Shoe Co. v. Pray*, (Sup. Ct. N. H.) 32 Atl. R. 770.

This answers the claim that Andrews and Whitcomb are liable for unpaid stock because they insisted upon a change of the corporate management in Jan., 1891. It was necessary to protect their security. The plant was unfinished and the management was unable and incompetent to complete it Forfeiture of the franchises was impending. The contract, by which the stock was held in pledge, was continued. The right of the corporation, or any one with its rights, to free the stock, bonds and franchises by paying the debt, was unaffected. No creditor was harmed. All creditors were benefited. The change and further advances saved the corporate property and added to its value.

It Was Error to Cancel the Bonds.

The holder of bonds as collateral, holds any mortgage securing them, as collateral. 1 *Jones on Mortgages*, Secs. 819, 820, 821; 18 *Am. and Eng. Enc. of Law*, 648; *Duncombe v. Ry Co.*, 84 N. Y., 190. If these bonds were valid, Andrews and Whitcomb were, to the amount of their debt, mortgagees under the trust deed (Rec. 281) on the plant and franchises for their security. The statute declares the bonds void, because the corporation did not receive seventy-five per cent. of their face in money, labor or property, when it issued them. Sec. 1753 R. S. Wis.

Though the bonds are void, the debt they were to secure is not; and the corporation, having received and used the creditors' money in the construction of its plant, cannot have the bonds cancelled in equity, without paying or tendering the debt. "He who seeks equity must do equity. An *ultra vires* act will not be set aside, *unless the money or property received by the corporation from third persons thereby is returned to such*

persons." 2 *Cook on Stock, etc.*, § 743. In *Hinckley v. Pfister*, 83 Wis., 64, the suit sought to cancel pledged bonds void under this statute. The court said: "Seeking equity, the corporation, or *any one suing in its right*, would be required to do equity, and make tender, as a condition of relief, of the debt for which they [bonds] were pledged." (p. 79.)

Mumford v. Ins. Co., 4 N. Y., 463.
1 *Pomeroy's Eq. Jurisprudence*, Sec. 391.
In re Cork, etc., Ry. Co., L. R. 4 Ch. App. 478.
In re Durham Co., etc., Soc. L. R. 12 Eq., 516, 521.
Crompton v. Zabriski, 101 U. S. 601.
Joy v. St. Louis, 138 U. S., 1, 40.
Ry. Co. v. Wade, 140 U. S., 65, 69.
Ferry Co. v. Ry. Co. 73 Mo., 413.
Buncombe v. Ry. Co. 84 N. Y., 190.
1 *Jones on Mortgages*, § 127 and cases.
Jones on Corporate Bonds, § 219.

"The rule," says Pomeroy, "extends to all cases where a party seeks to have a contract set aside and cancelled on the grounds of its illegality in violating the provisions of some statute; the court will require him, as a condition of its granting the relief to pay what is really due on the agreement, unless the illegality is a *malum in se*, or the statute itself prevents the imposition of such terms." 1 *Eq. Jurisprudence*, § 391.

There being no fraud or estoppel, the complaining creditors have no higher equity than the corporation, to have the bonds cancelled. 3 Thompson Com. Law of Corporations, § 2933; 84 N. Y., 190. They are in no worse position than if the bonds issued had just equaled the debt for which they were pledged, and cannot, therefore, be injured by enforcement of the corporate duty to pay the debt as condition of cancellation.

The error is material. In effect, this decree cancels the judgment of the state court, which adjudges the debt due the plaintiffs a lien on the bonds and vests their title and possession in the purchaser under the judgment. (Case 583.) That title makes the purchasers mortgagees under the trust deed which secures them. The purchasers, or those under them, are also in possession of the plant and franchises. They may claim, as mortgagees in possession under the trust deed. Concede, for the present, that appellee can have the adjudged title and possession avoided, because not parties to the judgment. They cannot have affirmative relief against such title and possession or anything dependent thereon or acquired thereunder, without doing equity. Cancellation, on condition of paying the debt, *is* equity. It gives effect to the intent of the parties that the creditors should have the security of the trust deed, without which the corporation would not have obtained the money

advanced. It is the same, in results, as if bonds to the amount only of the advances had been issued; the same as if the pledgees had surrendered to the corporation all bonds in excess of their debt, or had surrendered all bonds and taken new ones for the amount of their debt. It effects the object of the statute, viz: protection of shareholders and creditors against payment of *more* than the corporation receives for its bonds. It protects a claim of exceptional merit; for money that went to build the plant, and saved it from forfeiture.

While equity will not cancel securities void by statute, without return of what was received for them, it will also refuse aid to actively enforce them. These bonds are technically void by statute, because seventy-five per cent. of their aggregate face value was not received for them when they were issued. And although equity will not *enforce* the bonds themselves, even for the amount actually received for them; it may and should enforce the corporate duty to give bonds to the amount authorized. For the $64,000 advanced by Andrews and Whitcomb, the corporation could, within the statute, give them bonds in pledge to the amount of $85,333.33. Its several written contracts with them required it to give them in pledge bonds to the amount of $100,000. The corporation could have refused to deliver the $100,000 in bonds, because it had not received seventy-five per cent. of that amount in money; it could not have refused to deliver $85,000 in bonds. Because it could not deliver *all* the bonds it had agreed to, it was not excused, after it had taken and used the money, from delivering *any*. It was its duty to give the pledgee an amount of bonds which it could give, within the amount it had agreed to give. The corporation agreed, in effect, to give the pledgee $85,000 in bonds, secured by a trust deed on the plant and franchises, to secure the debt of $64,000. Equity regards that as done which ought to be done. It will, hence, consider the agreement to deliver $85,000 of bonds in pledge as performed, and the pledgees as equitable mortgagees under the trust deed to secure them. A court of equity "treats an agreement for a mortgage or pledge of bonds or other property, as binding, and will give it effect according to the intention of the parties."

Canal Co. *v.* Vattette, 21 How., 414.
Duncan *v.* Water Works, 8 Price, 697.
Fector *v.* Philpott, 12 Price, 197.
Seymour *v.* R'y Co., 25 Barb., 284.
Jones on Corporate Bonds, 2 Sec. § 34.
Chase *v.* Peck, 21 N. Y., 581.
Cottrell *v.* Long, 20 Oh., 464
Russell *v.* Russell, 1 Bro. C. C., 269.
Miller *v.* Moore, 3 Jones (N. C.) Eq. 431.
R'y Co. *v.* Talman, 15 Ala., 472.

And even if, by statute, no bonds were legal, the trust deed would not be illegal. The statute does not so declare. It would still secure the actual valid debt.

Jones on Corporate Bonds, and Sec. 20.
Scott *v.* Colburn, 26 Beav., 276.
Holdsworth *v.* Dartmouth, 11 A. & E., 490.

"The mortgage," says Mr. Jones, "may be valid, being expressly authorized, while the acknowledgement of indebtedness secured, as for instance bills of exchange, may be prohibited, in which case the mortgage would be regarded as securing the debt for which the bills of exchange were given, and therefore not on that account invalid." Corporate Bonds, § 20.

Equity deals with the substance of things. These bonds, good or bad, were not security for the debt of Andrews and Whitcomb. They were but promises of the *debtor*—no more security than its *notes* or verbal promises. *The trust deed was the agreed security.* The real transaction was this: The corporation by the contract of Sept. 13, 1890, agreed to secure the debt by a trust deed on the plant and franchises, and, by the trust deed executed and recorded on Nov. 13, 1890, did secure it. The delivery and possession of the bonds, and the contract, connected the debt and deed; identified the debt secured. From Nov. 13, 1890, the debt was secured by *a legal* mortgage on the plant and franchises. That mortgage covered future advances and after acquired property. *Jones vs. Indemnity Co.* 181 U. S., 622. *Teleg. Co. v. Deposit and T. Co.*, 147 U. S., 431. If appellee and R. D. Wood and Co. have no liens, as we claim, the legal mortgage is paramount to the rights of all the complaining creditors. If the two lien-claimants have liens, the legal mortgage is paramount to the claims of the four other creditors. Andrews and Whitcomb also had an equitable mortgage from Sept. 13, 1890, by the contract of that date whereby it was agreed to mortgage the franchises and plant to secure the debt. This was paramount to the mechanics' liens, if there were any; since such liens are not within the recording act, and are only upon such interest in the premises as the debtor has. They are the same as the lien of a docketed judgment and subject to prior equitable liens.

Rees v. Luddington, 13 Wis., 308.
1 *Black on Judgments*, § 445.
Goodell v. Blumer, 41 Wis., 436.
Wells v. Burton, 108 Ind., 585.

These rights must be regarded. They forbid cancellation, save upon payment of the debt or replacement of the bonds cancelled with such as the pledgee is entitled to. They even

require enforcement herein, so far as protection of the debt and the security of the trust deed and judgment demand it.

It was error to decree or enforce mechanics' liens in favor of appellee and R. D. Woods & Co.

First. The decree in *Nat. Pipe and Found. Works v. Water Co.*, 52 Fed. Rep., 43, is not *res adjudicata.*

1. Andrews & Whitcomb were not parties of record in that suit. It is claimed that, as stockholders of the defendant, they were in privity with it, and hence bound by decree against it.

A stockholder may lend to the corporation and take security from it; and, in such transaction, is a stranger to it.

4 *Thompson Com. L. of Corp.* §§ 4459, 4460.
Merrick v. Coal Co., 61 Ill., 472.

It is only in suits respecting his rights and liabilities *as a shareholder*, that a former judgment against the corporation concludes him.

2 *Black on Judgments*, § 583.
Freeman on Judgments, § 177.

In a suit to hold the stockholder, as such, for some liability of the corporation, a judgment against it, fixing the liability, binds him, because *it represents him*, as one of its members, in the first suit, as to the same thing for which he is sued, as a member, in the second suit. Every case cited to the ruling below is of this class. But the rights of a secured corporate creditor, who is also a stockholder, are independent of his membership, and antagonistic to the corporation. He cannot be affected as to such rights, by a judgment against it only, because as to them, *it does not represent him*, any more than any other debtor, in a litigation against himself only, represents his creditor.

As mortgagee he stand in the relation of a stranger to the corporation, *Stratton v. Allen*, 16 N. J. Eq., 229-232; *The Prest. M. & Co. of the B. & B. Turnpike Rd. v. Myers*, 6 Serg. & Rawle, 12; *Gordon v. Preston*, 1 Watts, 385; *Cent. R. R. v. Claghorn*, 1 Speers Eq. (S. C)., 545; *Angel & Aims on Corp.*, § 233; *Heath v. The Silverthorn Lead Mining and Smelting Company and others*, 39 Wis., 146. And see Jenkins, Cir. Judge, in *Phipps . Harding* (C. C. A., 7th Circuit) 70 Fed. R., 468, 478, where, speaking of a director's contract with his corporatien, he says:

"Their contract is personal and individual and is not "affected by their official relation to the company, etc."

In Heath *v.* The S. L. M. & S. Co., 39 Wis., 146, Heath sued to foreclose a mortgage securing a note given by the corporation, claiming as innocent purchaser of the note, bought

before maturity from the president of the company, between whom and the company equities in favor of the company existed that would defeat the note. The company had also pledged 7,000 shares of its unissued stock as collateral to the note as well, which Heath, while holding as pledgee, voted, and the company claimed he was therefore a stockholder and as such charged with notice of the equities. Held not. See opinion, pp.157-8.

That a stockholder or director may deal at arms' length like any individual, with a corporation, is well settled. Thompson, Corporations, §§ 1079, 4075; Stratton *v.* Allen, 16 N. J. Eq., 229.

As to the Effect of Andrews & Whitcomb Becoming Owners of the Stock by Bidding It in at the Sale Under their Foreclosure Decree.

It was claimed, at the hearing, for complainant and interveners that, because Andrews & Whitcomb became purchasers of the stock at their foreclosure sale they became stockholders then, if they were not before. This claim has no greater force than the claim that they became stockholders, and hence privies, by the issue of the stock certificates to them October 18, 1890, for, holding the stock as pledgees of the corporation there making title to it by foreclosure of the pledge no more created an obligation to pay creditors then it did to pay the corporation any new consideration for it. It might as well be claimed that, after they bid in the stock at the foreclosure sale, the Water Company could have compelled them to pay into its treasury the balance, above the loans, of its par value, or that one bidding in mortgaged property at the mortgage foreclosure sale could be made to pay the mortgagor or his creditors the excess value of the property over the mortgage debt.

The essential thing is wanting throughout—privity. Andrews & Whitcomb were no more in privity with Oconto Water Company after bidding in the stock on their foreclosure sale than they were while holding it as security, for the line of divergence from a stockholder's liability upon which they started was not changed by that event, but rather—had they, by that bid, acquired title to the stock (which they did not, for it was ever an absolutely void issue)—would it have had the effect of closing against the corporation and creditors alike the door to all pursuit. That, in the very nature of things, must have been the result, for if, while holding the stock as pledgees *of the corporation* they would *not* be subject to the pursuit of creditors, it would be strange doctrine that would make them so if they became owners by foreclosing the contract of pledge. Ownership in such case

would be so dangerous that it would have to be avoided to save incurring liability and the security would fail.

Nor can Andrews and Whitcomb be held as parties to the lien suit, on any probability that they managed its defense. An estoppel of *record* cannot rest on a surmise from facts *in pais*. It is not even sustained by positive proof that one not a party managed the defense, without much more. The "interposition must have been so complete that" the person managing "was practically substituted for the defendant in the management of the case;" and he must have "defended the action *avowedly* and *with notice to the opposite party*."

2 *Black on Judgments*, § 540.
La Croix v. Lyons, 33 Fed. Rep., 437.
Schroder v. Lahrman, 26 Minn., 87.
Brady v. Brady, 71 Ga., 71.
Majors v. Cowell, 51 Cal., 478.
Ass'n v. Rogers, 42 Minn., 123.
Allen v. Hall, 1 A. K. Marsh, 525.
Freeman on Judgments, § 189.

In the Minnesota case, it was said: "If it be conceded that one not a party to an action may be estopped, or claim an estoppel, by the judgment, because he is the real party in interest, and conducts the defense, yet he must do so *openly*, and to the *knowledge of the other party*, and for the defense of his own interest." 42 *Minn.*, 123. "The person not a party to the record, nor a privy, against or in favor of whom it is sought to use a judgment as an estoppel, must not only, in fact, take part in the controversy, but must do so openly, and to the knowledge of the opposite party." 26 *Minn.*, 87.

The management must be *avowed* and *notified*—so as to be of record, it seems—to the opposite party, because estoppel by judgment must be mutual. 2 Black on Judgments, § 548.

Next, one cannot be bound by a judgment as a *constructive* party to a suit, as to interests which he could not have asserted as an *actual* party to it. The existence, priority, or supremacy of mechanics' liens, as against other incumbrances, cannot be considered in the lien suit, *unless the complainant tenders the issue.*

Cook *vs.* Goodyear, 79 Wis., 606.
Ins. Co. *vs.* Morrison, 56 Wis., 133.
Lego *vs.* Medly, 79 Wis., 211, 217.
Planing Mill Co. *vs.* Shada, 72 Wis., 277.

Appellee, in the lien suit, tendered no such issue. It alleged no other incumbrance, or claim of one, and made no incumbrances a party. It industriously declined the invitation of the statute to make Andrews and Whitcomb, the City of Oconto and

the Water Supply Co. parties, to bind them by the decree. Andrews and Whitcomb could not have been made actual parties to that suit, if they had tried; and could not, under the bill, as mortgagees or creditors, have contested appellee's claim of lien, if it had made them actual parties.

2. The lien decree against the Water Company only does not affect the City of Oconto. It was not a party or privy in the lien suit, and had no connection with its defense. Yet it was a necessary party to a complete determination of the right to a lien.

Iron County *vs.* Council Bluffs, 25 Fed. Rep., 170.
Williams *vs.* Bankhead, 19 Wall., 563.
North Ind. R'y *vs.* Mich. Cent. Ry., 15 How., 233.
Walsh *vs.* Preston, 105 U. S., 297.
1 Foster Fed. Practice, §§ 53, 60.

In Williams *vs.* Bankhead, the court stated these rules: 1. "Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case will be subject to a special rule. 2. Where a person is interested in the controversy, but will not be directly affected by a decree, in his absence, he is not an indispensable party, but should be made a party if possible, and the court will not proceed to a decree without him, if he can be reached." The city is not only interested in the controversy, but will be directly affected by the decree and its enforcement.

The Water Company, in supplying water to the city and its inhabitants, exercises the police power of the state, as its agent.

Olcott v. Supervisors, 16 Wall., 594.
Water Co. v. Rivers, 115 U. S., 680.
Loan Ass'n v. Topeka, 20 Wall., 661.
Cohn v. Boom Co., 47 Wis., 324.

"No matter who the agent is," the court said of the exercise of such power, in *Olcott v. Supervisors*, "the function performed is that of the state." The proposition is indisputable and is reinforced by further authority, hereinafter. The immediate representative of the state is the city. The state authorizes it to vest the franchises and easements in the public streets necessary to perform the sovereign function, in a *corporation of the state only*, and to regulate the manner and conditions of performance. The city is the primary custodian of these easements and franchises, for the state, charged with the duty of using them for the health, comfort and safety of its citizens, either directly or through a specified sub-agent only. These franchises and easements, joined to the tangible plant, give it its principal value;

and give the city a proprietary interest, as a beneficiary, in the whole. It has a right to the use of the unified property, for itself and citizens, by the terms of an ordinance, which is a law as well as a contract.

Hayes *v.* Ry. Co., 111 U. S., 228, 237.
Village *v.* Thompson, 59 Vt., 300.

The public duties of the Water Company, correlative to these rights, may be enforced by the city by the prerogative writs and extraordinary relief in equity. In the case of *Iron County v. Council Bluffs*, 25 Fed. Rep., 170, Judge Shiras held that, in such a case, the city is a *necessary* party to a determination of the right to lien, under the second rule of *Williams v. Bankhead*, if not an indispensable party, under the first rule of that case. He said: "If the decree asked by complainants should be granted, and the property be sold under such a decree, the purchaser would become the owner of the main and distributing pipes which are beneath the streets of the city, placed there under the authority of the city. Are such pipes, placed in the streets and highways of the city, to subserve a public purpose, to-wit, that of furnishing a supply of water to the city and its inhabitants for public and private use, subject to a mechanic's lien, even if the same are owned by a private corporation other than the city? * * * * It is clear * * that the interests of the city are liable to be affected by a decree in the nature prayed for." After the city, on this ruling, had been made a party, it could have disputed the right to a lien. It may dispute it, when given its day in court for the first time in another suit. That the city is an indispensable party is clear. The decree directs a sale of the plant, including the easements and franchises, to the highest bidder. The purchaser may be a nonresident, alien, foreign corporation, or any incompetent, irresponsible, dishonest, or inaccessible party who can pay his bid. Such a devolution of agency directly affects the proprietary interests and the public rights and duties of the city. A decree that directly removes an agent or changes trustees, directly affects the principal or beneficiary.

The city, in this suit, did not answer. The question of the right to lien was presented on the face of the bill. There was no need of answer; and the city could have appealed had the decree been taken *pro confesso*.

Cent. Ry. Co. *v.* Trust Co., 133 U. S., 83.
Masterson *v.* Howard, 18 Wall, 99.

3. The complainant waived the bar, if any, of the lien decree.

The original bill herein claimed no lien. It was asserted by amendment of the bill. (Case, 167, 620.) The amendment,

first made after the decision appealed from and overrules a prior construction which the lower court followed.

Bauserman *v.* Blunt, 147 U. S., 599.
Stutsman County *v.* Wallace, 142 U. S., 293.
Kibbie *v.* Ditto, 93 U. S., 674.
Moores *v.* Nat. Bank, 104 U. S., 62.
Greene *v.* Neal, 6 Pet., 291, 297.

The extent to which these cases go is pointed out, in Bauserman *v.* Blunt: "In Patten *v.* Easten, 1 Wheat, 476, 482, and again in Powell *v.* Hannan, 2 Pet., 241, this court had construed a Tennessee statute of limitations in accordance with the decisions of the supreme court of the state, made since the first of those cases was certified up to this court, and supposed to have settled the construction of the statute. Yet in Greene *v.* Neall, 6 Pet., 291, a judgment of the circuit court of the United States, which had held itself bound by those cases in this court, was reversed, because of more recent decisions of the state court establishing the opposite construction. * * * Upon the question of how far a saving clause as to married women, in a statute of limitations is affected by a subsequent statute of the state enlarging the rights of married women, this court, in two comparatively recent cases, has come to different conclusions by following, in each case, a single decision made by the highest court of the state, since the case was brought to this court from the circuit court of the United States. Kibbie *v.* Ditto, 93 U. S., 674; Moories *vs.* Bank, 104 U. S., 625.

It is hard to reconcile these cases with Burgess *v.* Seligman. In that case there had been no construction by the state court when the federal decision was made, and Mr. Justice Bradley justly says the federal court was not required to suspend its decision until the state court had spoken. But no more was the lower federal court required to suspend its decisions, until the state court had overruled its former construction, in Bauserman *v.* Blunt. The construction of the state court is the *rule of decision*, and it is the rule of the decision when the appeal is determined that must guide its decision; just as the construction of an act of Congress by the federal supreme court is its rule of decision in a subsequent case, although that construction may have been adopted after the judgment appealed from, and may have overruled a construction followed by the lower court. In Bauserman *v.* Blunt the statute was one of prescription or limitation; but the decision does not, and could not, on principle, go upon that fact. Such statutes affect the title to property, and should be excepted from this rule of decision, if any are. A mechanics' lien statute, if any, is within this rule. It gives an exceptional right, peculiar to the policy of the particular state. In Stutsman County *v.* Wallace, 142 U. S., 293,

the statute involved authorized the recovery of money paid on illegal tax sales. The court followed a decision of the supreme court of the state in another case, construing the statute, although the decision was made after the appealed cause was docketed in the appellate court, and reversed the construction of the lower court. The cases of Enfield *v.* Jordon, 119 U. S., 680; Bolles *v.* Brunfield, 120 U. S., 759, and Knox Co. *v.* Bank, 147 U. S., 91, are inapplicable. They went on questions of commercial law as to which the construction of the statutes of a state, by its courts, are not controlling in the federal courts; or on questions of general jurisprudence.

(2) But, in this case, the last decision of the state court was made before the decree appealed from. The court below did not need to wait for a construction by the state court. That construction existed, and was considered and repudiated in making the decree. It was held not a rule of decision solely because contrary to a former decision of the federal courts, which was *res adjudicata* herein. If it has been shown that such former decision was not *res adjudicata*, the error of this ruling has been demonstrated. Indisputably in such a case, the prior construction of the state court is the rule of decision in the federal court.

Even within the rule of Burgess *v.* Seligman, the construction of the state court should be adopted here. In cases of that class, the federal courts, the court says, "will lean towards an agreement with the state courts, if the question seems to them balanced with doubt," and will follow the state court, when they can see "fair and reasonable ground to do so." A striking instance of such "leaning" is shown in Roberts *v.* Lewis, 153 U. S., 367. The court overruled its own construction of a will, influenced by a state statute, and followed a later construction of the state court, although the change of construction defeated a title acquired before the state court had spoken, on the faith of the first construction by the federal supreme court. The decisions of the court below and this court prior to the decree herein are not, therefore, on any view *stare decisis;* and we may show, if we can, that the last decision of the state court was right, or, at the least, that the question of lien is "balanced with doubt" and that the state court had "fair and reasonable ground" to decide as it did.

Chapman V. Mfg. Co. *v.* Water Co., 89 Wis., 272, determines that a lien on a water plant for supplying water to a city and its inhabitants is not within the terms of the state statute, whether the plant is operated by a public or *quasi* public corporation; that the terms of the statute cannot be extended to such plant by construction; that public policy requires the exclusion of such plant from the statute; and that all this was settled in principle, in Wilkinson *v.* Hoffman, 61 Wis., 637,

and Yellow River Imp. Co. *v.* County, 81 Wis., 554—both decided long before the decision in Nat. P. and Found. Co. *v.* Water Co., 52 Fed. Rep., 43.

In Wilkinson *v.* Hoffman, decided in 1884, nearly six years before appellee sold its pipe to Oconto Water Company, a mechanic's lien was claimed on a water plant owned and operated by a city. The lien was denied on this ground: "The *comfort, health, safety and property of the citizens* would be greatly endangered by allowing the facilities for procuring water to be suspended, even for a short period. * * * Consequently on grounds of *public necessity and convenience*, we must hold that the lien did not attach." 61 Wis., 639. Of course, the necessity and convenience of the public and the effect of interference with the water supply is the same, whoever operates the plant. Its ownership is accidental to the principle of decision. It is an instrument of the police power of the state, and the right to operate it and use streets and public grounds in its operation, are prerogative franchises. The party that holds the plant and franchises, whether a public or a *quasi* public corporation, is *the agent of the state for the exercise of its police power.*

Wis. Riv. Imp. Co. *v.* Mansan, 43 Wis., 265.
Cohn *v.* Boom Co., 47 Wis., 324.
Talcott *v.* Township, 1 Flipp. (U. S.), 144.
Olcott *v.* Supervisors, 16 Wall., 694.
Water Co. *v.* Rivers, 115 U. S., 680.
Water Works *v.* Schotler, 110 U. S., 347, 354.
Locomotive etc. Woks. *v.* Ry. C., 20 N. J. Eq., 585.
Messenger *v.* Ry. Co., 36 N. J., 407, 413.
Ditch Co. *v.* Zellerbach, 37 Cal., 343.
8 Am. & Eng. Enc. of Law, pp. 588-9, 614-615.

Speaking of a railroad, the court, in Olcott *vs.* Supervisors, said: "It has never been considered a matter of any importance that the road was built by the *agency* of a private corporation. *No matter who is the agent*, the function to be performed is *that of the state.*" 16 Wall., 694. In Water Co. *vs.* Rivers, 115 U. S. 680, it was said: "The right to dig up and use the streets and alleys of New Orleans, for the purpose of placing mains and pipes to supply the city and its inhabitants with water, *is a franchise belonging to the state.*" The supply of water by the agency of a private corporation was held an exercise of the police power. "A company of this kind," the court said, in Messenger *vs.* R'y Co., 36 N. J. L., 413, "is invested with important *prerogative franchises*, among which are the rights to build and use a railway and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although *in the hands of a private corporation*, they are still prerogative fran-

chises, and must be used and treated as such; they must be *held in trust* for the general good." In Talcott *vs.* Supervisors, 1 Flip. (U. S.), 144, the court said: "The road once constructed, is, instanter, and by force of the grant and law, *embodied in the governmental agencies of the state, and dedicated to public use.* * * * The judicial personage—the corporation created by the sovereign power expressly for this sole purpose—is, in the most strict, technical and unqualified sense, but *its trustee.*" Chief Justice Ryan, in Cohn *vs.* Boom Co., 47 Wis., 324, said that a private corporation formed to improve navigation of a river must be "held to be a *quasi* public corporation, an *agent of the state* for the improvement of the river, and its franchises granted for a public use."

If a water plant is an instrumentality, and the party that holds and operates it, whether city or private corporation, an agent, for the exercise of the most transcendent power of the state, a decision that there can be no mechanic's lien upon such plant where the city holds and operates it, because it would interrupt or interfere with such exercise, determines that there can be no lien where a private corporation holds and operates the plant; for the enforcement of the lien, in each case, has the same effect upon the exercise of the same power.

The state court, before any lien decree in the federal courts, had otherwise decided that there is no lien in such a case. In Yellow River Imp. Co. *v.* Wood County, 81 Wis., 554, it had held that "the franchises and corporate rights," of a log driving corporation, "and the means vested in them, which are necessary to the existence and maintenance of the object for which they were created, are incapable of being granted away and transferred by any act of the company itself, or by *any adverse process against it.*" In Water Co. *v.* Fond du Lac, 82 Wis., 322, the ruling was applied to a water company, organized as this was, under Sec. 1780, R. S. Wis. The court said the company "was a *quasi* public corporation, *clothed with an important public trust.*" The principle, when thus declared, was universally applied.

It embraced executions.

8 Am. & Eng. Enc. of Law, p. 634, i.
Gue *v.* Canal Co., 24 How., 263.
Buncomb *v.* Tommey, 115 U. S., 135.
Hammock *v.* L. & T. Co., 105 U. S., 90.
Ry. Co. *v.* Doe, 114 U. S., 340–353.

Tax warrants:

25 Am. & Eng. Enc. of Law, 656.
Appelgate *v.* Ernest, 3 Bush., 684.
Water Co. *v.* Hamilton, 3 Am. & Eng. Corp. C., 421.

Mechanics' liens:

Buncombe *v.* Tommey, 115 U. S., 122, 128.

McNeil *v.* Pipe etc. Co., 38 Fed. Rep., 565.
Mining Co. *v.* Supply Co., 58 Fed. Rep., 732, 741.
Foster *v.* Fowler, 60 Pa. St., 27.
Rutherford *v.* Ry. Co., 35 Oh. St., 559.
Lead Co. *v.* Waterworks, 62 Ind., 63.
Dun *v.* Ry. Co., 24 Mo., 493.
Graham *v.* Road Co., 14 Bush. (Ky.), 425.
Ry. Co. *v.* Driscol, 52 Tex., 13, 466.
King *v.* Alford, 24 Am. & Eng. R. Cas., 331.
Breeze *v.* Ry. Co., 26 Gr., 225.
New England Co. *v.* Ry. Co., 11 Md., 81.

And voluntary alienation:

Thomas. *v.* Ry. Co., 101 U. S., 83.
Ry. Co. *v.* Winans, 17 How., 30.
Trans. Co. *v.* Pullman Car Co., 139 U. S., 24, 40–49.
Navigation Co. *v.* Ry. Co., 130 U. S., 1.
Branch *v.* Jessup, 106 U. S., 468, 484.
Carpenter *v.* Mining Co., 65 N. Y., 43.
Abbott *v.* Horse Ry. Co., 80 N. Y., 27.
Ry. Co. *v.* Ry. Co., 115 Mass., 351.

In bestowing rights and franchises on a corporation that is the agent of the state for the exercise of its functions, it is presumed that the legislature had regard to the character of the grantee, and the guards and restrictions placed upon the corporation. In Ry. Co. *vs.* Williams, 17 How., 30, the court said of the sale or transfer of such franchises: "Those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide facilities * * * required for public convenience. *Corporate management and supervision over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant.* The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature." This was repeated in *Thomas vs. R'y Co.*, 101 U. S., 83, and this statement of the doctrine by Chancellor Zabriski approved: "It may be considered as settled that a corporation cannot lease or alien any franchise, or any property *necessary to perform its obligations and duties to the state*, without legislative authority." *Black vs. Canal Co.*, 22 N. J. Eq., 130. In *Trans. Co. vs. Pullman Car Co.*, 139 U. S., 24, the court said: "A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration of the grant of its franchise." It was held that "general authority to sell and dispose of *property*" would not

give it such power, and that the rule is the same whether the corporation is created by special act or under general laws. P. 49.

The state of Wisconsin has restricted the exercise of its function to provide water for the health,comfort and safety of this city and its people to one of two designated agencies. 1. The city may own and operate water works. Sub. 11,Ch. 56 L. Wis.,1882, p.211. 2. It may delegate the agency to a particular domestic corporation, created for the special purpose of exercising it. Sec. 1780 R. S. Wis. These agencies are exclusive. The city cannot delegate its agency to any individual, or a foreign corporation, or any other domestic corporation than the one designated. Nor can the specified corporation sub-delegate its agency without specific statutory authority; nor without such authority, can its agency be transferred by "any adverse process." To enforce this lien decree does change the agency. The highest bidder at the lien sale may be an alien, non-resident, or foreign corporation, or any party other than the agent appointed by statute. The corporate management, supervision and responsibility, fixed by the legislature for the exercise of this sovereign power, cannot be thus shifted and nullified against its consent. The reasons against transfer by voluntary act and judicial process are, of course, the same, and the two are usually joined in the denial of the right. Thus in the Wisconsin case, the court said such franchises "are incapable of being granted away by any act of the company itself, or by any adverse process against it." 81 Wis., 554. "The substantial reason," why they cannot be sold on execution is "that corporations are generally created in consideration of an obligation on their part to perform certain *public duties*; from which it follows that the object of their creation might be defeated if their franchises could be seized in execution by any creditor, who might or might not be able to exercise them." 6 Thompson Com. L. Corp., § 7853.

No statute gives power to alienate the franchises of such a corporation, or its property indispensable to the exercise of its franchises. The court below cites section 1748 R. S. Wis. for such power, and argues hence that as it may voluntarily dispose of its property and franchises, they may be taken on adverse process. That section, with one exception, is an enumeration of the ordinary powers of corporations. These, by the first five subdivisions, are the powers to contract, to sue and be sued, to have a common seal, to elect officers, and to make by-laws. Subdivisions 6 and 7 are as follows: "6. To take and hold property, both real and personal, to an amount authorized by law, and sell, convey, or otherwise dispose of the same. 7. To *mortgage* its *franchises*, tolls, revenues and property, both real and personal, to secure the payment of its debts * * * *with the*

consent of a majority of its stockholders." Subdivision six, like the preceding subdivisions, is *declaratory*. All corporations, by general principles of corporation law, may acquire and dispose of property. A trading or manufacturing company may sell all of its property, although thereby it is disabled from exercising its franchises; because such exercise is not the performance of any duty or function of the state. A *quasi* public corporation may sell any property not required for the performance of such duty or function. A railroad, gas, water or improvement company always owns some such property. The words and purpose of the provision are satisfied, by restricting the power of disposition of such a corporation to such property. It could not have been intended to authorize a disposition that would prevent a corporation from exercising the functions of the state as its agent; as a sale by a railroad company of a section of its road, by a gas company of its factory, by a water company of its pumping station, by an improvement company of its dams, divorced from the prerogative franchises held in trust for public use. And it does not authorize a sale or disposal of *franchises*. Power to do that is not embraced in power to sell and dispose of real and personal property. Trans. Co. *v.* Pullman Car Co., 139 U. S., 49; Pullan *v.* Ry. Co., 4 Biss., 35. This is made certain by subdivision seven. That provision is *enabling*. It permits a *mortgage* of the *franchises*, as well as of the real and personal property, *on consent of a majority of the stockholders*. By the rule that power to alienate franchises must be specific, and the maxim *expressio unius est exclusio alterius*, mortgage by vote of stockholders is the sole method of transferring franchises. Section 1748, instead of impliedly authorizing, by necessary implication prohibits the encumbrance of this plant by a mechanic's lien and the sale of it and the franchises to satisfy the lien. The need of power to mortgage for corporate credit was thought to overbalance the objection to alienation by possible foreclosure. There would be good reason for permitting mortgage and refusing mechanic's lien. Mortgages might reasonably be, as was required, on the vote of stockholders. They could not result in alienation until a year from judgment. Mechanics' liens are likely to be more numerous. There cannot be a vote of stockholders whenever materials are bought or labor hired that might result in a lien. The sale for the lien is "absolute and without redemption." Sec. 3326 R. S. Wis. But be the reason good or bad, it is enough that the only encumbrance on franchises permitted by this statute is a mortgage.

The federal and state courts agree that there is no lien on the franchises. 52 Fed. Rep., 57. The court below breaks to the hope its assurance to the ear, and, in effect, imposes the lien. A mechanic's lien is a right to seize and sell property to satisfy

the debt of the lienor preferentially. Such right the decree enforces against the franchises. It decrees that the lien debts be first satisfied from the proceeds of the sale of the plant *and* franchises. The reason universally given why corporate property, necessary for the exercise of franchises for the public, is not subject to judicial sale, is that it is inseparable from the franchises *which are inalienable.* The court below reverses the reasoning and holds that the franchises *are alienable,* because the property necessary for their exercise is subject to judicial sale. The court adds, as a reason, that the act of the corporation made the property and franchises inseparable. That is always so; since the corporation always joins the property needed with the franchises in their exercise. If the reasoning is sound, every franchise of every corporation, however essential to the exercise of its public agency, is always transferable on judicial process; for it must always be joined by the corporation, for efficient use, to tangible property subject to such process but for the joinder.

The franchises cannot be sold because incidental or appurtenant to the plant. If inalienable because prerogative, they are inalienable although appurtenant or incidental. But they are not appurtenant or incidental to the plant. The grants of them "were grants in gross of incorporal hereditaments, and *not* grants appurtenant to any particular land, lots or estate" Water Co. *v.* Fond du Lac, 82 Wis., 328. "The franchise is the principal thing. * * * It is not appurtenant to the plant." Chapman V. and Mfg. Co. *v.* Water Co., 89 Wis., 273.

Sec. 1788 R. S. Wis. provides for the formation of a corporation by purchasers of corporatefranchises at bankrupt, foreclosure and other judicial sales. This does not imply that all or any prerogative franchises are the subjects of such sales. The provision has ample scope when applied to the franchises of strictly private corporations, and of *quasi* public corporations which some statute specially makes subject to such sales. It is like provisions authorizing corporations generally to sell and dispose of their property; which do not permit the transfer of prerogative franchises — although property — or of tangible property essential for the exercise of such franchises. *Trans. Co. v. Pullman Car Co.,* 139 U. S., 24, 49. On bankruptcy, such franchises may be sold. *Ry. Co. v. Delamore,* 114 U. S., 501. Bankruptcy, in effect, dissolves the corporation and ends its agency for the state. The corporation is within the terms of the bankrupt act, which may be said to expressly authorize the sale. Some things said in the Delamore case are inconsistent with much that is said in *Trans. Co. v. Pullman Car Co.,* and in the decisions therein reviewed. But this is not important here. It is sufficient that the decisions of the federal supreme court settle the rule, that while a corporation *is a going*

concern its franchises granted for public use cannot be alienated. If it cannot transfer them by contracting a lease or sale, it cannot by contracting a lien debt. The mechanic's lien cannot rest upon the insolvency or dissolution of the corporation. If it is given at all, it is given against a corporation in the active performance of the duties of its agency for the state; and such corporation may always absolve itself from its public duty and responsibility by contracting a lien debt.

The tolls and income of such a corporation may be sequestered, through a receiver, to pay its debts. *Drawbridge Co. v. Shepard*, 21 How., 112. This is *because its franchises cannot be sold on judicial process.*

Foster *v.* Foster, 60 Pa. St., 27.
Water Co. *v.* Hamilton, 3 Am. & Eng. C. C., 421.

A sale of the franchises outright to the highest bidder is a different and inconsistent thing. Sequestration need not interrupt the exercise of the corporate franchises. It may only require payment of the revenues in whole or in part to the receiver. The interruption, at most, is temporary. So far as corporate management is interfered with, it is taken by a domestic court and returned when the debt is paid. The interference is the least in degree and safest in kind consistent with the collection of the debt. In *Ry. Co. v. Parker*, 9 Ga., 378, cited in *Drawbridge Co. v. Shepard*, and quoted from by the court below, a statute specially authorized the sale of the franchises. In Ry. Co. *v.* James, 6 Wall., 750, a state statute made a judgment a lien on the real estate and road bed of a railroad company. Another statute made franchises real estate. The charter of the company specially empowered it to sell the railroad. (Book 18, L. C. P. Co. Repts. S. C. U. S., p. 855.) A decree for the sale of road and franchises was sustained, without discussion of the power to sell franchises.

The ordinance in form grants the franchises to the Water Company and its "successors and assigns." The statue only authorized the grant to the corporation. Sec. 1780 R. S. Wis. If franchises are inalienable without the special consent of the legislature, the ordinance cannot make them alienable. Even in a statute, such words will not give power to transfer franchises. Trans. Co. *v.* Pullman Car Co., 139 U. S., 24.

In Wisconsin, as every where, then, it had been determined, when this lien decree was made, and long before Appellee and the interveners became creditors of Oconto Water Company, that the statute gave no lien on a water plant owned by a city, because the public health, comfort and safety depends upon it: that a *quasi* public corporation which owns such a plant is an agent of the state for the exercise of one of its functions, as much as a city which owns it; and that the franchises, and

property necessary for their exercise, of such a corporation, cannot be sold on judicial process without special statutory authority. There is no such authority unless given by the lien law itself. That that law does not give it in this case, was determined in deciding that it does not give it when the plant is owned by the city; for the terms of the law include each case, if either, and there is the same reason for not including one as the other, by construction. The lien statute, omitting immaterial clauses, provides:

"Every person who * * performs any work or labor or *furnishes any materials* * * for, in or about the * * *construction* * * of any *building* or * * any machinery erected or constructed so as to be or become a part of the freehold upon which *it* is situated * * or in *digging* or *constructing* any *well* * * shall have a lien *thereupon* and upon the *interest* of the owner of such building * * machinery ** well ** in and to *the land upon which the same is situated* * * used, or designed for use, in connection with such building * * machinery * * well * * *not exceeding one acre.*" Sec. 3314 R. S. Wis.

Assume that the pumping station is a building. The liens claimed are for *materials.* Unless they were *furnished* for the *construction* of the pumping station or well, there is no lien; and no lien if they were thus furnished, save (1) on the pumping station and well and (2) the interest of their owner in the land on which they are built, *not exceeding one acre.* Special authority for selling such property on judicial process must be clear. Buncombe *v.* Com's, 115 U. S., 128; Freeman on Executions, §179. The lien judgment must be restricted to the relief expressly authorized.

Duse *v.* Horton, 57 Wis., 644.
Wilson *v.* Rudd, 70 Wis., 98, 103.
Tilford *v.* Wallace, 3 Watts (Pa.), 141.
15 Am. & Eng. Enc. of Law, 193.

The materials here were iron pipe furnished to be laid, and laid, *along and under eight miles of streets* (Case 82) and hydrants attached to such pipes. The pipe was not on the lots of less than an acre on which the pumping station and well were built, although connected with them. Laying the pipe and affixing the hydrants was not the "construction" of the pumping station or well. The pipe could be laid at any time before or after the station and well were completely constructed. The court below construes the statute as if it gave a lien for constructing a "water plant" however extensive, instead of a "building" or "well" on an acre of land or less. The eight miles of pipe is not appurtenant to the pumping station and well; and if it is, the statute gives no lien for an appurtenant, unless its construction is the construction

of some building or well, on an acre of land or less, to which it is appurtenant. Many things are appurtenant to a thing that do not enter into its *construction*. A right-of-way, miles in length, may be appurtenant to a building; but making the way is not constructing the building. On the interpretation of the court below, one who furnishes rails for an electric railway in a city has a lien for materials for the construction of the motor house, on the whole plant extending over fifty miles of streets. Or one furnishing pipe for conveying natural gas or water hundreds of miles has a lien for materials for the construction of any building used for operating the plant, on the building and plant.

The statute is thus unduly strained, to include laying pipe in the "construction" of a "building" miles away, and altogether disregarded, to extend the lien beyond an acre to eight miles of pipe and the company's interest in the land in which it is laid. That interest is an easement to keep, repair and extend the pipes in the streets. The pipe itself is a fixture and so an interest in land. The limitation is unqualified. It not only limits the interest in land to which the lien extends to an acre, *on which the thing constructed stands*, but thereby and by the kind of structures specified—buildings, wells, etc.—makes certain that structures on more than an acre were not intended.

Guaranty Co. *v.* Supply Co., 58 Fed. Rep., 732.
Buncombe *v.* Ry. Co., 115 U. S., 122.
Rutherford *v.* Ry. Co., 35 Oh. St., 559.

A statute of Ohio gave a lien for materials furnished for the construction of a building or "other structure," upon the structure and the owner's interest in the "lot or land" on which it was situated. It was ruled that a portion of a railroad and an electric street railway plant, although structures, were not structures situated on a "lot" or on "land" within the meaning of the statute. In the federal case, the circuit court of appeals said: "The lien here prayed is upon the railroad [street] as an entirety. * * * The premises and property against which it is asserted is the railroad, its motive and lighting apparatus and appliances, poles, ties, track and other structure, including that part thereof located in the power house." "It would be an exceedingly strained construction of this language to hold that the material for which the lien is claimed was *furnished* for *erecting* * * * a house or other structure mentioned in the statute." In Buncombe *v.* Ry. Co., 115 U. S., 128, the statute was much broader than here. The court said: "A law, giving to mechanics and laborers a lien on *buildings*, including the *lot* or *ground* upon which they *stand*, or a lien upon a *lot* or *farm* or *other property*, for work done

thereon, or for materials furnished in the *construction* or repair of *buildings*, should not be interpreted as giving a lien upon the roadway, bridges, or other property of a railroad company, that may be essential in the operation and maintenance of its road." The cases of Hill *v.* Ry. Co., 11 Wis., 214, and Purtell *v.* Bolt Co., 74, Wis., 132, on which the court below relies, carefully restrict the lien *to an acre of land*, although that acre was but the fraction of an entire plant. None of the cases cited by the court below sustain its construction. They were decisions of what passes in a deed as appurtenances, or of what the lien extends to under statutes which give it, not for *constructing* a "building" and restricted to an acre of land, but for improving land or work or labor upon it, without restriction of area.

But the last paragraph of Section 3314 is decisive. It provides:

"And whenever the doing *of manual labor on land*, for which a lien is given by this section, shall consist of *building a continuous* roadbed or *structure designed or intended for use as a single thing*, or as part of a *single thing*, and such roadbed or structure *is not limited in extent to one acre of land* in an incorporated city * * * but extends over and across more than forty acres of land, whether within or without, or partly within and partly without such city * * * *then* in every *such* case, the limitation to an acre * * * in this section contained, shall not apply, but the party entitled shall have a lien upon all the *interest of the owner* in and to the *whole of said continuous roadbed and structure* and the *whole of the land of the owner on which the same is constructed*, or which is intended to be used for the purpose of such roadbed or structure * * *; and in the enforcement of *such* lien the said roadbed or *structure*, if sold, shall be sold as *one continuous and single thing*.

The exception, here, from the acre limitation of the enacting clause, of a continuous structure extending over more than an acre, is conclusive of the legislative intent that such structure would be within the limitation but for the exception; and the restriction of the exception to the single case of *manual labor on land* is conclusive that all other cases of continuous structures are within the limitation.

Hawkins *v.* People, 106 Ill., 628.
Miller *v.* Kirkpatrick, 29 Pa. St., 226.
Fowler *v.* Scully, 72 Pa St., 456.
U. S. *v.* Macon Co., 99 U. S., 582.

The lien claims, here, are for *materials furnished* only; and the decree gives a lien for them on the whole structure regardless of the limitation.

Many things distinguish the cases of Hill *v.* Ry. Co., 11

Wis. 214, and Purtell *v.* Bolt Co., 74 Wis., 132, from Chapman V. Mfg. Co., *v.* Water Co., 89 Wis., 264, and from this case; and they were overruled when the lien decree below was made, on the only point to which they were cited to sustain it, and are fatal to the decree, on the only point not overruled. In the Hill case the lien was adjudged on a depot *building;* a structure certainly within the letter of the statute. In the Purtell case the lien was for constructing a railroad bridge. The Supreme Court had decided that such a bridge was not a "building." Ry. Co. *v.* Vanderpoel, 11 Wis., 124. The statute was amended by adding "any bridge" to the structures on which liens were given. The legislature *may* give a lien on property devoted to public use. There is force in the claim that the statute in terms did so in these cases. The lien was for work on the specified structure itself. But here the liens claimed are not within the letter of the statute. It must be strained more than its text can stand to include them, we say; at any rate, they can only be included by a very strained construction.

Those cases do not decide that there is no public policy in Wisconsin against giving mechanics' liens on property necessary for the exercise of the franchises of any *quasi* public corporation, but only of railroad corporations. Their facts and reasoning thus limit their ruling. This is not necessarily inconsistent with a ruling that there is such a policy against imposing the lien on such property of these water companies. The inclusion or exclusion of the lien, by statutory construction, goes much on the inconvenience and injury to the public likely to result from giving the lien. The dependence of the public on railroads may be as great or greater than it is upon water works; but the inquiry, at this point, is, would the public injury from the enforcement of the lien, probably be as great in one case as in the other? The lien, in the Hill and Purtell cases, was confined to an acre of land. The chance that the corporation, retaining its franchises and the rest of its plant, and under heavy responsibility for its operation, would submit to the sacrifice and forfeiture involved in a lien sale of an acre of land, was very remote. That consideration might well influence a court in refusing to exclude from the statutes a lien within its letter. There is no such improbability of the sale of a water plant to enforce a lien. That might well weigh in excluding from a statute a lien not within its letter. The two classes of cases, in result, determine only that the policy of the state in giving liens on railroads and water plants is different.

But the Hill case, certainly, and the Purtell case, probably, have been overruled, and were repudiated by the court below *as to the ground of their decision.* The court, in the Hill case, denied that a railroad, with its franchises and property essential for their exercise, was an entirety; and held that it could be

severed by execution sale or other adverse process. A railroad company, as to the remedy of creditors against its property, stands, it was declared, on the footing of other purely private corporations. On that ground, it decreed a lien on a small portion of railroad property, essential for the operation of the road, severed from the bulk of the structure and the franchises. The decision is in exact contradiction of that in Buncombe *vs.* Tommy, 115 U. S., 122, 128, and of the principles declared in Yellow Riv. Imp. Co., *v.* Wood Co., 81 Wis., 554, and Water Co. *v.* Fond du Lac, 82 Wis., 332. In the first Wisconsin case above, it was held that the franchises and property essential for their exercise of a *quasi* public corporation, instancing a railroad company, were "incapable of being granted away and transferred by any act of the company itself, or *by any adverse process against it.*" The doctrine rejected in the Hill case, that such property cannot be seized and sold on execution, was approved, and the court declared: "The rights, franchises and plant essential to the continued business and purposes of the corporation, are not to be severed, broken up or destroyed, without express legislative authority, but on the contrary, are to be preserved *in their entirety.*" In the Fond du Lac case, where the corporation was a water company, the court repeated this ruling, and said further: "In view of the intimate and necessary relation of the lots and the mains, pipes and hydrants, which extend to most parts of the city, with the franchises and privileges of the plaintiff, it would seem that, as a subject of taxation, *as well as of sale under judicial process*, they are to be regarded as an *entirety.*" The court below, citing and approving these rulings, said: "The plant and franchises *may not be severed by judicial sale*, because of the peculiar public use to which the plant is devoted." 52 Fed. Rep., 57. Why not, if the lien universally denied elsewhere exists in Wisconsin only by force of the Hill and Purtell cases? The court, in those cases, *did* sever the plant and franchises, and it split the plant into fragments. Nothing can be more certain than that their fundamental proposition was denied in the decision in 81 and 82 Wis., and by the court below and that the court below rests its decision on the very contradiction of that proposition. That proposition was that no policy forbids severance. The court below holds that policy does forbid it. That ends the support of the Hill and Purtell cases to its decision. They forbid its further conclusion that, as there *is* such policy, to avoid severance, the lien must be extended to the whole plant and franchises as an entirety; for they deny the policy and decree the severance. To consort with such conclusions, the Hill and Purtell cases should have extended the lien to the whole railroad plant and to the franchise to operate it.

Failing support of the Hill and Purtell cases, no Wisconsin case sustains this lien decision It is against Wilkinson *v.* Hoffman, 61 Wis., 637; for the effect upon the health, comfort and safety of the public, from enforcing the lien, is the same whether a city or a water company is the agent of the state to supply water. It conflicts with the rulings in the 81 and 82 Wis., that the franchises and property required for their exercise, of such a corporation, are both inalienable and inseparable, without special legislative consent. It disregards the statute, in giving a lien for materials buried in streets, as used for the construction of a distant building, and in extending the lien beyond an acre and to corporate franchises. In thus extending the lien it is opposed to to the Hill and Purtell cases. It is contrary to Buncomb *v.* Tommey, 115 U. S., 122. It is against the decisions in Chapman V. and Mfg. Co. *v.* Water Co., 89 Wis., 264; Ry. Co. *v.* Milwaukee, 89 Wis., 506 and Street Ry. Co. *v.* Anderson, 90 Wis., 550, and the current authority everywhere. In C. & N. W. Ry. Co. *v.* Forest Co., (Sup. Ct. of Wis., Jan'y 12th, 1897), 70 N. W. R., 77, it is said, p. 79: "In the cases of Hill *v.* Ry. Co., 11 Wis., 223, and Ry. Co. *v* Fort Howard, 21 Wis., 45, the court acted upon the theory, without actually considering and deciding the question, that the franchises of a railway company and its property in use and necessary for their exercise and enjoyment, were not an entirety. These cases are not in accord with subsequent decisions in this and other states, and are not to be regarded as authority on the question." At the very least, by the extreme rule of Burgess *v.* Seligman, there is "fair and reasonable ground to acquie-ce," in the "view" of the state court; for it is the view of the federal supreme court and of every other court, of the true construction of such a statute.

The equities of Andrews and Whitcomb are in every way superior to those of the complaining creditors.

First. If there are any mechanics' liens, they are subordinate to the liens of Andrews and Whitcomb.

A half day's work was done in unloading pipe from the cars and distributing it in the streets, on Sept. 16, 1890. If that was constructing the pumping station or well within the statute, it was the commencement of their construction. By the agreement of Sept. 13, 1890, the Water Company mortgaged, in effect, its franchises to secure its debt to Andrews and Whitcomb for advances to construct the plant, and agreed to give them, to secure the same debt bonds within its power to give, not exceeding $100,000, secured by a trust deed. It was

an equitable mortgage of the franchises and of the plant as their incident, and of the bonds, and of the franchises and plant through the trust deed, by which it was agreed the bonds should be secured. The agreement antedated the origin of the lien, if any, and the advances under it began before such origin.

The agreement, without the fault of Andrews and Whitcomb, was not recorded at its date. So far as it affected the franchises and plant, it related to real estate. That term, by statute, includes *hereditaments*, and the franchises are incorpereal hereditaments. Secs. 4971, Sub. 9, and Secs. 2325, R. S., Wis. Water Co. *v.* Fond du Lac, 82 Wis., 322; 89 Wis., 273. The only effect of not recording an instrument affecting real estate, is thus declared: Every conveyance of real estate within this state hereafter made * * * which shall not be recorded as provided by law, shall be void as against any *subsequent purchaser* in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose *conveyance* shall be *first duly recorded*." Sec. 2241, R. S. The complaining creditors are not *purchasers* and have no *conveyance* to first record. No conveyance to them has been recorded. The lien law, itself, makes the mechanic's lien prior only to "any other lien which *originates* subsequent to the commencement of the construction" of the building. Sec. 3314, R. S. Wis. The lien of Andrews and Whitcomb *originated* before such commencement. The judgment and deed, under the lien statute, only transfer "the interest of the owner in the premises at the time of the commencement of the construction" of the building. Sec. 3324, R. S. Wis. The purchaser, on the lien sale, gets the interest of the owner of the building, and stands in his shoes.

There being no fraud in making or not recording the agreement, it may be asserted and enforced against any liens the complaining creditors may have precisely as it could have been asserted and enforced against the Water Company.

Rees *v.* Luddington, 13 Wis., 276.
Guy *v.* Carriere, 5 Cal., 511.
English *v.* Foote, 8 Sm. & Mar. (Miss.), 444.
Orr *v.* Batterton, 14 B. Mon., 100.
Phillips Mech. Liens, 9-225.

Second. There being no mechanics' liens, the complaining creditors have no equity to challenge any security of Andrews and Whitcomb. They are before the court merely *as judgment or simple contract creditors* of Oconto Water Company, with judgments taken *after Andrews & Whitcomb had foreclosed their mortgages, made title and obtained possession of the property.* See Walter *et al.*, *v.* Bickham *et al.*, 122 U. S., 320.

As to the instruments under which Andrews & Whitcomb claim, of date Sept. 13, 1890, if there was want of authority (from the company) in Garland and Todd, as president and secretary, to execute them at the time, the infirmity was cured by their formal ratification by the directors and stockholders at their meetings on the 29th of October following, at which time—if, as against Andrews & Whitcomb, they had not then acquired a lien upon Oconto Water Company's plant and franchise—complainant and intervener were only *general* creditors, and as such, bound by such ratification.

To secure their debt Andrews & Whitcomb have a mortgage on the corporate franchises; a right to have bonds to the amount the corporation had power to issue; the protection of the trust deed, which it was agreed should secure the bonds on the plant and franchises, from the date and record of such deed, if not from the time it was agreed to be given; two extensions of the mortgage of the franchises, and of the contract to give the bonds and deed, to further advances; a judgment of a court of competent jurisdiction foreclosing the mortgage and agreement; and a confirmed sale under such judgment. They and those under them are in possession of the plant and franchises.

If the securities, judgment and possession were taken to hinder or defraud creditors, creditors hindered or defrauded could, by proper proceeding, impeach them. But the securities were taken for an honest, meritorious and undisputed debt. The judgment and sale were for the amount of the debt only. The complaining creditors are in no worse position than if the bonds issued as collateral had just equaled the debt. Only three of them have judgments, and only one of these, for $838.88, has been docketed in the state court, so as to be a lien. 25 U. St. a L. Ch. 729, p 357. All of them are subsequent to the foreclosure, judgment and sale.

Such creditors cannot object that the foreclosure judgment and confirmation were erroneous, unless the error worked some fraud on their rights. "If a judgment is good as between the parties, it *is also good against their creditors*, unless it might have operated to defraud them *when it was rendered*." 2 *Freeman on Judgments*, § 335. Again he says: "Though a party seeking to impeach a judgment collaterally *is a creditor* of the defendant, and its enforcement will therefore operate prejudicially to him, yet he cannot assail it, *where it is not collusive*, on the ground that the defendant had defenses which he might have asserted." § 337.

1 Black on Judgments, § 294.
McAlpine *v.* Sweetser, 76 Ind., 78.
Sheets *v.* Hambert, 81 Pa. St., 100.

Thompson's Appeal, 57 Pa. St., 175.
Dougerty's Estate, 42 Am. Dec., 326.

As judgment creditors merely, Andrews and Whitcomb have the first lien. Their judgment was rendered Aug. 13, 1891, for $64,042.43. It became a lien on the plant and franchises, if subject to judgment liens, then. The three judgments of complaining creditors were rendered subsequently.

Finally, if the complaining creditors have any equity to relief against any securities of Andrews and Whitcomb, or the judgment of foreclosure and sale, or the possession under them, there being no fraud, collusion or estoppel, it could be granted only on a bill to redeem and on condition of payment of the secured debt, interest, costs and costs of improvements. This is not such a suit and should have been dismissed.

As to the Priority of Liens.

Should the court, however, be of the opinion that the lien-claimants are entitled to a decree establishing liens in their favor upon the plant and franchises involved in this litigation, the question of priority remains.

On this question the lien claimants have the burden. They bring the question into the case (if it is here) by the allegation in their amended pleadings that

> "said mechanic's lien decree, together with any and all "other mechanic's liens decreed against the aforesaid prem-"ises, said complainant alleges and claims to be a first "lien upon the same and entitled to priority over all other "liens asserted by or on behalf of any of said defendents."

It was expressly held in Hassall *v.* Wilcox, supra, that the mortgagee

> "had a right to go into the circuit court of the United "States to contest the priority of Wilcox's lien, and as his "claim originated after the mortgage was made, compel him "to prove *affirmatively* in that court the *existence* and *priority* "of his lien under the statute of Taxas." And see Davies *v.* "Alvord, 94 U. S., 545; Leftwich Lumber Co. et al. *v.* Flor-"ence Mutual Building, Loan & Savings Ass'n (Sup. Ct. of "Alabama, Nov. 15, 1894), 18 Southern Rpr., 48.

Having the burden it devolves upon complainant to show that Andrews & Whitcomb had acquired no right under any of the instruments bearing date September 13, 1890, *before the work of construction of the water plant at Oconto commenced.*

Andrews & Whitcomb claim as equitable mortgagees under the instrument executed at Menasha on the night of September 13th, and from that date.

If the instrument was valid without the corporate seal, it is a contract giving rise to a lien, an equitable mortgage—Pom. Eq. (2nd ed.) § 685, 165-167; Cook on Stock etc. (3rd) § 794; and as such, though unrecorded, takes precedence of the claims of general creditors, and is good against all the the world except a subsequent purchaser or encumbrancer of the same property *whose conveyance was first recorded.* Pom. Eq. (2nd ed.) § 721; Jones on Mortgages, §§ 163-167; Jones on Liens, §77. Though unrecorded it takes precedence of the lien given by the mechanic's lien statute: Payne *v.* Wilson, 74 N. Y., 348; Miller *v.* Stoddard, 52 N. W. Rpr., 895; S. C., 2nd Appeal, 56 N. W. Rpr., 131; Noerenberg *v.* Johnson *et al.*, 52 N. W. Rpr., 1069; Jones on Liens, §96; Rose *v.* Munie 4 Cal., 173; Quimby *v.* Sloan, 2 Abb. Pr. (N. Y.) 93; Root *v.* Bryant, 57 Cal., 48; Munger *v.* Curtis, 47 Hun (N. Y.) 465, per Pratt, J.; Oliver *v.* Davey, 34 Minn. The rule is, it is conceived, correctly stated in Jones on Liens, Sec. 1460, as follows:

> "Whether a mortgage must be recorded as well as "executed before a mechanic's lien has attached must "depend very much upon the terms of the different "statutes. Recording is not necessary to give the "mortgage priority under recording acts which make "the recording necessary only as against subsequent "purchasers and mortgagees. Thus, where a mechanic's "lien attached to property by the commencement of work "upon the premises after the execution of a mortgage, "but before the recording of it, it was held that the "mortgage was superior by virtue of the prior execution. "But in some states it is expressly provided that a mort-"gage must be recorded before a mechanic's lien attaches "in order to give it priority;" and in Phillips on Me-"chanics' Liens, § 234 (2d ed.) where it is said:
>
> "But where there was no law compelling a mortgage to "be recorded, an unrecorded one had priority over a "mechanic's lien which attached subsequently to its "execution."

The Wisconsin statute does not require conveyances or mortgages of realty to be recorded as against mechanics' liens. The mechanic's lien statute only makes the lien "prior to any other *lien* which *originates* subsequent to the commencement of the construction, etc.," not which is *recorded* subsequent to such commencement. Liens *originating* before are not affected. There is no statutory authority for the idea that the lien given by the statute takes precedence of a prior interest in realty, acquired in a valid manner, because such interest does not appear of record at the time of the commencement of the construction work. The lien given by the statute

and its relation to a prior mortgage was fully discussed by the Supreme Court of Wisconsin in Jessup *et al. v.* Stone *et al.*, 13 Wis., 466, where it was sought by a lien claimant to have his lien declared paramount upon a buildina to a pre-existing mortgage upon the land, the building having been constructed on the land after the land was mortgaged. The court say—pp. 470-1—

"But conceding counsel to be correct in saying that "the lien on the building is absolute, still we do not "think that the position that it is prior to that of a "previously existing incumbrance upon the land can be "maintained. At best it can only be said to attach at "the same point of time as that of the mortgage, and not "before it. It is a lien upon the building and not upon "the materials prepared and ready for its construction, "and hence it can not exist by virtue of the statute until "the building is commenced and some parts of the "materials transferred to and permanently made a part "of it. The commencement undoubtedly takes place "with the establishment of its foundations. But when-"ever this is done and any part of the material put in "its place so as to constitute a portion of the building, "it at the same moment of time becomes a part "of the realty, and the lien of the mortgage at "once attaches. So that the most that can be claimed is, "that both liens become operative at one and the same "moment, and that in point of time neither has the prece-"dence of the other. This being the case at the laying of "the 'corner stone,' the same continues during the entire "progress of the structure, and at no time can the lien of the "mechanic be said to reach back and cut off that of a prior "mortgage or other previous incumbrance. The language "of the act is, that the building and the land on which it "is situated shall be subject to the payment of debts to "mechanics and material-men, 'before any other lien "which originated *subsequent* to the commencement of such "house or building.' It clearly cannot be so constructed "as to displace and postpone liens which are contempora-"neous and not subsequent."

"But, more than this, it may well be doubted whether "the words which originated subsequent to the commence-"ment of such house or 'building,' were intended to ap-"ply to any but liens which are actually created by act of "parties after the building is in fact commenced; and "whether a previously executed mortgage or other prior "lien, is within their operation. We think it is not, and "for that reason the statutory lien cannot be preferred."

The discussion of the question in Chapman *et al. v.* Wad-

leigh *et al.*, 33 Wis., 267, leaves no room to doubt that the question of priority between statutory and mortgage liens is determinable from the dates when they originate respectively.

The lien given by the statute is only given upon the *interest* of the owner of the premises; it equals, but is no greater than the lien of a docketed judgment; Rees *v.* Luddington, 13 Wis., 276; Martin *v.* Fifield, 2 Wis., 73; Dean *v.* Wheeler, *id*, 224; Schmidt *v.* Gilson, 14 *id*, 514; Bailey *v.* Hull, 11 id, 289. The lien of a docketed judgment is almost universally held to be inferior to that of a prior unrecorded mortgage: Pom. Eq. (2nd ed.) §721, and cases cited.

Wis. P. M. Co. *v.* Schuda *et al.*, 72 Wis., is not in conflict. The court was there dealing with a *recorded* mortgage and there was no question of what would have been the effect if it had not been recorded.

The trial court gave effect to the recital in the lien decrees that Sept. 15th was the date of the commencement of the construction of the plant and, holding that the Menasha instrument of date Sept. 13th was not delivered until Sept. 15th, it held, as matter of law, that the construction work commenced before the instrument took effect as an equitable mortgage.

If the views expressed in this brief—pp. 112-113—under the heading, "As to when the Menasha agreement took effect," are correct, the trial court was wrong in holding that the agreement did not take effect (because not deposited with the bank) until the 15th of September; it should have held that the instrument became operative upon its execution on the night of the 13th.

But the proof is uncontradicted that the instrument was deposited in the bank—and, therefore, in the view of the trial court, was then delivered and became operative—on the morning of the 15th of September by Mr. Todd and Mr. Andrews. The work of construction had not then been commenced, for Mr. Todd, under whom the proof shows it commenced, was then in Menasha, and by his act of depositing the agreement in the bank, even under the trial court's theory that that constituted delivery, gave effect to the instrument at that time and thereby established its priority over the lien claimants.

Besides, all the witnesses testify that the money must be had before construction work *could* commence.

But complainant and R. D. Wood & Co., by the proof which they introduced under the amended pleadings in this action, disproved the recital in the lien decrees that Sept. 15th was the date of the commencement of the construction work, proving

the date to have been the 16th instead of the 15th. They at least are bound by the testimony which they offered in that behalf.

The foregoing, upon the question of priority of lien, is said with reference to Andrews & Whitcomb's equitable mortgage securing their first loan to the company.

As to Andrews & Whitcomb's Rights Under the Instruments of March 13th and May 16th, 1891.

The intrinsic superiorty over complainant's and R. D. Wood & Co's lien claims, of the liens acquired by Andrews & Whitcomb under the instruments between themselves and the water company of date March 13th and May 16th, 1891, the case of Union Trust Co. *v.* Morrison, 125 U. S., 591, clearly establishes. There the fact that the prior mortgagee, the trust company instead of moving for possession of the road by receiver promptly upon default occurring, allowed the railway company, the mortgagor, to continue in possession and to operate the road, was an important consideration impelling the court to recognize the superiority of Morrison's claim which arose in the meantime. Speaking to the subject the court says:

> "The trustees of the mortgage might have prevented such "a catastrophe (the levy, upon the rolling stock, of an "execution upon a judgment obtained against the road "while under the mortgage) it is true, by filing a bill of "foreclosure and for an injunction and receiver, but they "did not choose to take this course until nearly three "years afterwards; on the contrary they allowed the rail-"road to continue to use the property and to take care of "it for them and stood by and saw Morrison put his hands "into the fire and rescue the rolling stock of which they "were to receive the benefit, both directly, by receiving "the property itself without contest or controversy, and "indirectly, by keeping up the railroad as a going concern. "Morrison's money or the fruits of it has gone into their "pockets."

Are not the facts here precisely the same? At the time Andrews & Whitcomb assembled the creditors in Chicago for conference upon the subject of finishing and saving the enterprise, the mechanic's lien claimants refused to participate in going ahead with the enterprise and forced Andrews & Whitcomb to either abandon it themselves or proceed at their peril. At this point equity and good faith required of the lien-claimants either participation in completing and saving the en-

terprise, or an immediate resort to foreclosure proceedings and the appointment of a receiver, in which all parties could have been brought in and the whole matter disposed of under orders of the court, but they did not choose to take this course. On the contrary they forced Andrews & Whitcomb to take the entire peril of going forward with the enterprise and when the fruit had ripened under their care and risk, the claimants came forward asserting first rights to it. The claim is an utter elimination of conscience and justice from the situation and equity will find little in it to favor.

It is submitted to the court that not only does this case not fall within the class of cases which this court has been accustomed to call here for review after the court of appeals has by an undivided judgment disposed of it, but that the case was correctly decided by the court of appeals upon the merits.

April 13, 1897.

W. H. WEBSTER,
Solicitor for Appellants.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1896.

THE NEWARK ELECTRIC LIGHT AND POWER COMPANY,
Plaintiff in Error,

vs.

HENRY M. GARDEN, ADMINISTRATOR, &C., OF JAMES A. MASON, DECD.,
Defendant in Error.

Petition of The Newark Electric Light and Power Company for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

JOHN O. H. PITNEY,
MAHLON PITNEY,
Counsel for Petitioner.

Holbrook Printing House, 11-13 Mechanic Street, Newark, N. J.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D., 1896.

NEWARK ELECTRIC LIGHT AND POWER CO.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI

Requiring the Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court, for its review and determination, the case of The Newark Electric Light and Power Company, Plaintiff in Error, vs. Henry M. Garden, Administrator, &c., of James A. Mason, deceased, Defendant in Error.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Newark Electric Light and Power Company respectfully shows to this Honorable Court as follows:

First. This is an action brought in the Circuit Court of the United States for the Third Circuit in the District of New Jersey by Henry M. Garden (a citizen of Pennsylvania), administrator, &c., of James A. Mason, deceased, against your petitioner, the Newark Electric Light and Power Company (a corporation of New Jersey), to recover pecuniary damages for the death of said decedent, alleged to have been caused by the negligence of your petitioner.

A verdict was rendered in favor of the plaintiff for $10,000, which was subsequently reduced to $7,000, and judgment for that amount was entered against your petitioner. That judgment was removed, by writ of error, to

the United States Circuit Court of Appeals for the Third Circuit, where the cause was argued on September 25th, 1896, before their Honors Marcus W. Acheson and George M. Dallas, Circuit Judges, and Leonard E. Wales, District Judge.

On November, 30th, 1896, the opinion of the majority of the Court was filed by Judge Dallas, Judge Wales concurring therein, affirming said judgment. Judge Acheson filed an opinion dissenting from the majority of the Court and from the judgment of affirmance. Thereupon, on December 2d, 1896, it was ordered that the judgment be affirmed with costs. On January 4th, 1897, a petition for a rehearing was filed, which was denied on March 2d, 1897, no opinion thereon being filed, and Judge Wales having in the meantime died.

Second. The facts in the case were few and simple and were scarcely disputed, and the circumstances under which the death of plaintiff's intestate occurred are clearly stated in the two opinions filed in the Circuit Court of Appeals, which appear in the transcript of the record filed herewith, and are also annexed hereto.

For the convenience of the Court the following extracts from the opinion of Judge Acheson are here quoted to show briefly the circumstances under which the accident in controversy occurred:

> "James A. Mason was an experienced lineman in the employ of the Pennsylvania Railroad Company, and on the occasion when he lost his life was one of a gang of that company's linemen engaged in removing the railroad company's telegraph wires from an old line of poles owned by the Western Union Telegraph Company to a new parallel line of poles of the railroad company recently erected. One of the Western Union Telegraph Company's poles stood at the southeast corner of Hamilton street and Railroad avenue in the city of Newark. There were upon the pole ten cross-arms, all carrying wires. The topmost arm belonged to the city of Newark; the second, third and fourth cross-arms from the top belonged to the Western Union

Telegraph Company; the fifth, sixth and seventh cross-arms from the top belonged to the Pennsylvania Railroad Company; the eighth and ninth cross-arms from the top belonged to a telephone company; and the tenth from the top, or the bottom cross-arm, belonged to the Newark Electric Light and Power Company, the defendant below. The bottom cross-arm was a short arm, about four feet in length from end to end. The other cross-arms were considerably longer. The distance from the defendant's cross-arm to the lowest cross-arm of the Pennsylvania Railroad Company could not have been less than six feet.

"To facilitate the removal of the railroad company's wires to their new location, that company's linemen put upon the Western Union pole two long temporary cross-arms above the defendant's cross-arm, between it and the lower permanent cross-arm of the telephone company, and at the time Mason was killed he and his fellow-linemen were engaged in shifting the telephone wires from their own proper arms to the two temporary cross-arms. In doing this work Mason stood upon the defendant's cross-arm. Immediately before he received the fatal electric shock his legs were astraddle of the lower temporary telephone cross-arm, but he stood with both his feet upon the defendant's cross-arm.

"After Mason had gone up the pole and while standing on the defendant's cross-arm, he was warned by the foreman, Powell, and also by his fellow-workmen, that the defendant's wires were carrying heavy currents of electricity and were dangerous. Once Mason was observed to be actually standing on one of the defendant's wires, and was warned off by the foreman. He was repeatedly cautioned against the danger from the defendant's wires. All the foregoing appears from the testimony of the plaintiff's witnesses.

"The catastrophe occurred in this wise, as these witnesses state: Three of the railroad company's linemen were on this particular Western Union pole, two of them above Mason. One of the two handed Mason a telephone wire to attach to the outermost knob of the upper temporary telephone cross-arm, and Mason, having taken this wire in his right hand, which was ungloved and bare, stretched out his person so as to make the desired attachment, and as he made this movement his left foot came in contact with the end of the de-

fendant's wire, which was on that projection of the defendant's cross-arm upon which Mason then stood; and thus he received the electric shock that killed him. The plaintiff's witnesses who afterwards examined the defendant's wire testified that there were 'two bare points' at the end of the wire.

"It was shown by testimony which was not directly contradicted, and which practically was unshaken, that the defendant company within sixty or ninety days before the disaster, had caused this part of its wire to be carefully and perfectly insulated in the usual and approved way. How and when the 'two bare points' were made was not shown.

"No usage was proved, nor was positive testimony produced, tending to convict the defendant of negligence or want of due care in not causing its wire to be inspected in the short interval between the insulation in February or March and the date of this occurrence in April.

"It is by no means an improbable supposition that the two minute bare spots at the end of the wire were caused by the action of Mason's boots or the spurs with which he was equipped."

It was established and not controverted that rubber gloves were supplied to the Pennsylvania Railroad linemen, with instructions to use them in places of danger; that pairs of such gloves were accessible to Mason; that he had none on when the accident occurred; that if he had worn them he could have received no electric shock. There was no evidence in the case of any contract between the Pennsylvania Railroad Company and the owner of the telegraph pole regarding the use of it, nor of any contract between your petitioner and any other company using the pole to support its cross-arms, regulating such use, nor giving any rights to any such company with reference to your petitioner's cross-arm.

There was no proof in the case that your petitioner had any notice that the Pennsylvania linemen were using or intending to use your petitioner's cross-arm for any purpose, nor that it knew that there was any defect in the insulation of its wire at the point in question; there was no proof of

any custom or practice among linemen to use the cross-arms of other companies when working on a telegraph pole.

Third. These facts appearing in evidence, your petitioner, upon the trial below at the close of plaintiff's case, asked for a non-suit, and at the close of the whole case asked the Court to direct a verdict for the defendant. These motions being denied, your petitioner presented some requests to charge, which were denied.

Fourth. Upon the review of this case by the United States Circuit Court of Appeals your petitioner assigned errors to these various rulings, and urged in support of them that, among other things, it owed no duty to Mason, because he was a trespasser while standing on its cross-arm; that Mason at the time the accident occurred was either a trespasser on your petitioner's cross-arm, or, at most, a mere licensee of its use, and in the former case no duty whatever existed except to refrain from wilfully injuring him, and in the latter case no duty existed except to refrain from setting a trap for him; that no higher degree of care could be imputed to your petitioner, unless it had invited Mason to so use its cross-arm, and of this there was no proof.

These principles of law, it is respectfully submitted, are firmly established by the decisions of the courts of England, New Jersey and the other States of the Union and the Federal Courts.

The opinion of the majority of the Circuit Court of Appeals, as your petitioner understands it, finds that your petitioner set no trap for Mason, but owed him an undefined duty, notwithstanding he was a trespasser, yet fails to indicate what that duty was, nor wherein your petitioner failed to discharge it; and bases its conclusion upon two cases decided in the State of Pennsylvania and one decided in this Court, all of which, however, as pointed out in the dissenting opinion of the Circuit Court of Appeals, were cases of injuries to infants, and involving other controlling cir-

cumstances not existing in this case, such as knowledge on the part of the owner that his premises were in dangerous condition, and that they were constantly used by the public.

Your petitioner also urged that, by the undisputed facts developed in plaintiff's case, Mason was so plainly guilty of contributory negligence in making use of your petitioner's cross-arm in defiance of repeated warnings from his foreman and fellow-workmen, that the case should have been taken from the jury and a verdict directed in your petitioner's favor.

Fifth. Your petitioner furnishes herewith a certified copy of the entire record of the case in the Circuit Court of Appeals, as required by the rules of this Court, and respectfully calls particular attention to the opinions filed by said Court and contained in the copy of the record, and annexed hereto, from which it will readily appear, as your petitioner respectfully contends, that upon the questions of law, regarding which said Court was divided in opinion, a majority of said Court expressed views at variance, not only with many authoritative decisions in this country and England, but also with the opinions of the United States Circuit Court of Appeals in other Circuits in the cases of

Cleveland Railroad Company v. *Phillips*, 24 U. S. Appeals, 489 (Seventh Circuit).

St. Louis Railway Company v. *Bennett*, 32 U. S. Appeals, 621 (Eighth Circuit).

Kansas City R. Co. v. *Cook*, 31 U. S. Appeals, 277 (Sixth Circuit).

In all of which it has recently been distinctly held that a person owes no duty to a trespasser on his property except to refrain from wilfully injuring him.

Your petitioner also claims that this decision is at variance with the decision of this Court in the case of

Mitchell v. *The New York, &c. R. R. Co.*, 146 U. S., 513,

and with the rule as circumscribed and the principles enunciated in the case of

Bennett v. *Louisville, &c. R. R. Co.*, 102 U. S., 577, in which it seems to your petitioner to have been conceded that no duty would have been owing to the plaintiff in that case if he had been a trespasser on the defendant's premises, or the defendant had merely passively acquiesced in his use of its premises, or had merely permitted the plaintiff to use the premises without invitation, inducement or allurement held out to him. And the decision in the Circuit Court of Appeals is also at variance with a recent decision (1893) of the Court of Errors and Appeals of New Jersey in the case of

Phillips v. *Library Company*, 36 Vroom, 307,

where it was held that no duty is owed to a trespasser, and that no duty, except to refrain from wilful injury, or setting a trap, is owed to one using the dangerous premises of another for his own benefit or convenience by mere permission or acquiescence of the owner, and that invitation on the owner's part is necessary to raise a duty of care.

Sixth. Your petitioner respectfully submits that it is advised and believes that the said judgment of the United States Circuit Court of Appeals in this case is erroneous and in conflict with the uniform course of decision in the courts of this country (many of which will be cited in the brief to be submitted herewith): that thereby your petitioner has suffered great injustice, and has been convicted of a neglect of duty without being informed what that duty was, nor in what respect it had failed to discharge it; that, as the result thereof, your petitioner and all others similarly situated are left in ignorance of their duties for the future, and the law relating thereto is left in confusion and uncertainty; and as said decision affects the relations and duties of a great many electric companies throughout this country toward the employees of other companies, and as there was a marked diversity of opinion between the judges of the United States Circuit Court of Appeals on the questions involved, and as your petitioner, by the death of Judge Wales pending its application for a rehearing, was deprived

of the opportunity of having the questions of the conflict between the majority opinion and the opinions in similar cases rendered by other Circuit Courts of Appeals considered by a full court, your petitioner is advised that this case presents questions of such gravity and importance and such a conflict of decisions, that, upon the principles enunciated by this Court in the case of

Lau Ow Bew v. *U. S.*, 144 U. S., 47,

this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the Sixth Section of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes, approved March third, eighteen hundred and ninety-one, the decision of the Circuit Court of Appeals in this case being by said act made final except by certiorari.

Seventh. Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in this case, to the end that the said case may be reviewed and determined by this Court, as provided in the Act of Congress before mentioned, and that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem proper and in conformity with said Act, and that the said judgment of said Circuit Court of Appeals in this case and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

THE NEWARK ELECTRIC LIGHT AND POWER COMPANY,
JOHN O. H. PITNEY,
MAHLON PITNEY,
Attorneys and Counsel for Petitioner.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

John D Harrison

being duly sworn, according to law, on his oath says, that he is the President of the Newark Electric Light and Power Company, the petitioner above named; that he has read the above and foregoing petition, and that the facts therein stated are true to the best of his knowledge, information and belief.

John D Harrison

Subscribed and sworn to before me, this }
7th day of March, 1897. }

George A Price
Notary Public
New Jersey

L S

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1896.

To Messrs. BARTON & DAWES,

Attorneys of Henry M. Garden, administrator, &c., of James A. Mason, deceased.

In the action mentioned in the annexed and foregoing petition you will take notice that on Monday, the nineteenth day of April, eighteen hundred and ninety-seven, at the opening of the Court, or as soon thereafter as counsel can be heard, the petition, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of said Court thereon.

Yours, &c.,

JOHN O. H. PITNEY,
MAHLON PITNEY,
Counsel for the Newark Electric Light and Power Company, Petitioner.

Service of a copy of the foregoing notice, and of the petition for writ of certiorari annexed thereto, is hereby acknowledged this merely formal day of March, 1897. Said nineteenth day of April, 1897, for its submission to the Supreme Court, is agreeable to us.

Barton & Dawes
Atty of defts in error & respondent.

UNITED STATES CIRCUIT COURT OF APPEALS.

THIRD CIRCUIT.

THE NEWARK ELECTRIC LIGHT AND POWER COMPANY,
Plaintiff in Error,
vs.
HENRY M. GARDEN,
Administrator, &c.

In Error to the Circuit Court of the United States for the District of New Jersey.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

OPINION OF THE COURT.

DALLAS, Cir. Judge: This action was brought in the Circuit Court for the District of New Jersey, by the administrator of the estate of James A. Mason against the Newark Electric Light and Power Company, for causing, by its negligence, the death of Mason. There were a verdict and judgment for the plaintiff, and thereupon the defendant sued out this writ of error. The usual defences were set up in the Court below. Negligence on the part of the defendant was denied, and contributory negligence on the part of the deceased was asserted; but upon these subjects, considered separately and apart from the fundamental question to be presently dealt with, the majority of the Court has experienced no difficulty. There is no specific criterion of care which could have been applied in this case. Neither the defendant nor Mason disregarded any determinate provision of the law prescribing what the conduct of either of them should have been, for there is no such provision. The only rule which they, respectively, were bound to obey, is the general one, which enjoins the exercise of *due* care—the observance of such caution as, under the circumstances, an ordinarily prudent man would have observed. Whether either of them failed to perform this indistinctly defined obligation (assuming its existence on the part of the defendant) was a question of fact and of inference. The facts

were controverted, the inference was disputed, and the evidence was not conclusive. Therefore, unless the case should have been entirely withdrawn from the jury upon the underlying question about to be considered, no error was committed in submitting to it the issue as to negligence, both as respected the defendant and the plaintiff's intestate. The specifications, other than the third—which will be especially referred to—need not be further discussed. Although the charge of the Court is, perhaps, open to some criticism, it exhibits no reversible error, if not upon the one important and quite distinctive subject to which attention is now to be directed.

There is no liability for negligence where there is no duty of care. Consequently, a plaintiff who grounds his action upon an allegation of negligence by the defendant, must show, not only that the conduct of which he complains was negligent in character, but also that it was violative of some duty which was owing to him. That the conduct of this defendant was not careful, and that its lack of care, and not any negligence of Mason himself, was the cause of the death of the latter is established by the verdict; but, as we have said, the whole subject of negligence was inconsequent if, under the law and the evidence, the defendant was under no obligation to regard Mason's safety. The primary, separate and controlling question upon this record therefore is: Was the defendant bound to exercise care—"ordinary care,"—as the Court below held—to provide against the occurrence of such a calamity as befell Mason? That this inquiry may be intelligently answered it is requisite that our investigation of the law should be based upon a correct conception of the facts to which it is to be applied, and those which are pertinent to this particular subject may be briefly stated. The Western Union Telegraph Company was the owner of a certain telegraph pole, upon which the Pennsylvania Railroad Company rightfully maintained several electric wires, immediately supported upon three cross-arms. The defendant company, also rightfully, maintained two wires, supported, one on either side of the same pole, upon a single cross-arm. How this right, in either case, was acquired, is unimportant. There is no doubt that, in both, it existed, and that, in fact, the pole was lawfully used, not only by its owner, the telegraph company, and by a certain telephone company, but also by the railroad company and by the defendant. There were twelve cross arms in all, including the two temporary ones hereafter mentioned. The lowest was that which sustained the wires of the defendant, and above—at a distance of several feet—was one of those upon

which were the wires of the railroad company. In the space between these two bars, were those in use by the telephone company, and below the latter and above that of the defendant company, two new ones were inserted by the railroad company, to facilitate the transfer of its wires, and Mason was one of several men employed by that company, who, upon the occasion in question, were engaged in making that transfer, which consisted in removing its wires from the poles of the telegraph company (including the pole which has been specified) to certain other poles which belonged to the railroad company itself. Mason ascended this pole and placed himself finally—what he had previously done is immaterial—in the situation which he occupied when he met his death. His right foot was upon one side of the cross-bar on which there was an electric wire of the defendant. This foot, however, was not, and did not become, in contact with the wire; it rested at a point sufficiently removed from it to be free from danger. In point of fact, the accident did not result from the position of his right foot, for the fatal connection was made through his left foot, which was thrown over the next bar above (the lower of the two new bars) and was "dangling down towards the lower bar"—the one upon which was the defendant's wire. While in the position described, a telephone wire was handed to Mason by a fellow workman, and, in reaching out to grasp it, his pendant left leg was naturally, perhaps necessarily, extended towards the wire of the defendant, and, in consequence, his left foot either touched it or came so near to it that, by reason of the thus electrically connected interposition of his body between that wire and the telephone wire, which he had seized in his left hand, he was subjected to the shock which killed him.

NOTE BY THE COURT: This statement of the situation of Mason is taken substantially from the charge of the Court below, in which it was said:

> "While so employed, suddenly and without warning, he gave a groan; his body was convulsively twitched, then rigidly straightened out. His right foot was upon the lower cross-bar on which were the electric wires. His left foot was thrown over the next bar above and was dangling down towards the lower bar. His right arm was around the pin on the third cross-bar, and in his left hand he had grasped a wire known as a telephone wire which had been handed to him by a fellow-workman."

There is, it is true, some evidence which, standing alone,

would seem to be to the effect that Mason was, though astride of the bar next above, wholly resting upon the bar used by the defendants; but, taken as a whole, we think it shows that one of his feet was and must have been "dangling" as described by the learned judge, at the time when he received the shock. He was in the act of reaching out, and naturally, we think, must have had one of his legs extended in a direction opposite to that in which he was reaching. To quote the language of several of the witnesses:

> "He stood in this shape, one arm between his legs, and he was reaching out to the extreme end of the arm. Q. No. 2 arm? A. No. 3. Q. He had his leg over No. 2, his foot on No. 1, and he reached over to No. 3 to make a fastening at that point? A. Yes, sir." * * "He was standing on the arm this way (illustrating), and another arm between his legs, and reaching out to fasten it to the end of the arm." * * * * * * "He had to reach out on account of this bottom arm—was a six-foot arm, and the other a ten-foot arm—and he had to reach out about a foot." * * * * * * "His left foot was behind his right foot, and sometimes would be on the bar and sometimes would not."

It is obvious that this testimony could be exactly comprehended only by one in whose presence it was given; and to such an one, no doubt, it was made perfectly clear by the illustrative movements of the witnesses. Therefore, we have accepted that understanding of it which the learned judge who heard it, without intimation of doubt on his own part, or of objection from either party, assumed to be the correct one. Indeed, the brief of the plaintiff in error presents the matter in a manner not materially different, viz.:

> "At the time of the accident, Mason was standing on defendant's cross-arm on the north side of the pole facing west, his legs astride the next cross-arm above, his right foot resting on defendant's cross-arm, his left foot also touching it, or swinging free in the air as his body moved. While in that position the telephone wire was handed to him, which he took in his right hand and was apparently about to adjust to the outermost pin on the third cross-arm. As he did so his left foot came in contact with defendant's wire, and from that received apparently an electric shock through his

body, connection presumably being made through the telephone wire in his hand."

It has been thought desirable that this note should be made, in order that it may not be supposed that the evidence on this subject has not been fully considered—not because it is deemed to be of vital importance, for it is not.

The defendant's wire was a large one and was highly charged. It was insulated, but the insulation was defective, and but for its exposed condition at one minute point this disaster would not have happened.

If, in view of the facts which have been narrated, it could be unqualifiedly asserted that, at the time and place of the accident, Mason was wrongfully upon the separate property of the defendant, and if nothing but that bare fact should be regarded, but one conclusion could be reached; for the law is well settled that, in general, the right to keep his own property in such condition as the owner may see fit is not restricted by any requirement to guard against its causing injury to one who, without invitation, actual or apparent, but as a bare volunteer or mere trespasser, intrudes upon it. This limitation of the principle that no person may lawfully use even that which is his own so as to do hurt to another is, however, not controlling in all cases; and the duty of care which the law imposes upon those who undertake to operate so dangerous a force as electricity, may, under some circumstances, be due to one who, technically, is a trespasser. In such a case as this one, its special facts are for consideration, and upon them, and not solely with reference to the ownership or occupancy of the *locus in quo*, the question of duty must be determined. "It is true, that where no duty is owed no liability arises * * * * * * * But it has often been said, duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to *accident*, the rule will vary." Hydraulic Co. v. Orr, 83 Pa. St., 332. It makes no difference, where the circumstances give rise to duty, that the plaintiff was "technically a trespasser." Schilling v. Abernethy, 112 Pa. St., 437. The true question is: Was he "a trespasser there *in a sense that would excuse the defendant for the acts of negligence?* * * * * * * Whether the owner or occupant of premises is liable under any circumstances, and, if so, under what circumstances, for inju-

ries received by a person while on such premises, and by reason of their dangerous condition? In Union Pacific Railway Co. v. McDonald (152 U. S., 262), the question was thus stated, and, in answering it, the Supreme Court held that, under the circumstances of that case, the person injured could not be regarded "as a *mere* trespasser, for whose safety and protection, while on the premises in question, against the unseen danger referred to, the railroad company was under no duty or obligation whatever to make provision." The fact that, in these cases, the courts gave due weight to the circumstances that, in each of them, the person injured was a child, would not justify us in restricting the application of the principle upon which they were decided to cases which present the same peculiarity. The doctrine of all of them is that a duty of care may, by reason of the circumstances, be due from the owner of property to one who is technically a trespasser upon it: and the youth of those most likely to suffer from a failure to discharge such duty, is simply one of the circumstances, which, when present, is to be considered with the rest. The opinion of the Court, in the case last cited, cannot be read without perceiving that the matter was so viewed by the Supreme Court of the United States; and the Supreme Court of Pennsylvania, by which the two cases first cited were decided, has repeatedly held that a child may be such a trespasser as to be subject to the consequence of his trespass. It has never laid down one rule with respect to children and another respecting adults, but has many times said that the former, like the latter, when trespassers "in every sense of the word," are to be regarded as wrongdoers, to whom the owner of the premises is under no obligation. Rodgers v. Lees, 140 Pa. St., 457; Mitchell v. R. R. Co., 132 Pa. St., 226.

It is only by liberally construing the assignment of errors that any of the specifications can be taken to raise the particular question with which we are now dealing. But two of them can be said to present it, even by implication. These are:

> "*Second.* That the plaintiff having rested his case the defendant's counsel moved for a non-suit on the ground that no sufficient negligence on the part of the defendant had been shown to maintain the action, and also on the ground of contributory negligence on the part of the plaintiff's intestate, which motion was overruled.

"*Third.* That upon the completion of the evidence in the case, the counsel of the defendant renewed his motion for a non-suit, and moved for a direction of a verdict for the defendant upon the same grounds as stated in the former motion, which motion was overruled."

The refusal to non-suit is not reviewable (Western Union Tel. Co. v. Thorn, 12 U. S. App., 107); but the denial of the defendant's request for binding instructions is, and that the plaintiff in error may have the utmost advantage of his exception to that denial, we will consider this specification as if he had distinctly put his request that the case should be withdrawn from the jury, upon the further ground that the evidence would not warrant a finding that there was such a duty of care resting upon the defendant as was requisite to the maintenance of the action. But, still, we do not think that the facts of this case would have warranted the learned judge in adopting such a course. The several occupants of this pole had, by virtue of the contract under which they jointly used it, a common interest that its use should not be environed with unnecessary danger. Each of them owed the duty to take all reasonable precautions for the prevention of injury to the servants of any of the others who might be sent there in pursuance of the common right, and we cannot agree that this duty was so circumscribed that it ceased to exist if any of these servants happened to rest his hand upon a cross-bar, or—as in this instance—to place his foot upon it. It is by no means clear that the fact that Mason was partly upon the defendant's cross-arm at all contributed to the result. On the contrary, it is certain that he might have stood wholly upon it at the point at which his right foot was placed without incurring any hazard whatever, for at that point there was no wire, and his left foot might have been accidentally extended to it if he had been entirely upon the lower of the two new cross-arms, or even upon the pole itself. Apart from this, however, he was not a mere trespasser upon the cross-arm of the defendant. There was nothing in the surroundings to inform him that he ought not to go there, or that he would incur any risk if he did. The wire was insulated, and the defect in its insulation was not readily discernable. The cross-arm, apparently, presented a safe footing, and, but for the defect in insulation, it was entirely safe to stand upon it. Union Pac. Railway v. McDonald, supra p. 268. It may be conceded, as was decided by the Supreme Court

of New Jersey, in N. Y. & N. J. Tel. Co. v. Speicher (not yet reported), that the defendant was not bound to make cross-bars intended for the purpose of supporting wires, of sufficient strength to support a man; but each case of this nature must be decided on its own facts, and in this one there is no question about the strength of the bar. It was quite strong enough to sustain the weight which Mason put upon it. There was no risk involved but that which the presence of the wire created, and that was apparently provided against by insulation. So far as appeared, therefore, the bar was not dangerous; and, in placing himself where and as he did, this man was doing his work, as one of the witnesses said, "the same as any man would do it that works at the business," and common sense and humanity demanded, as we think, that while so working his life should not have been put in jeopardy—we do not say by a trap, for there was no purpose to ensnare, but by an unknown and invisible peril, to which he might unconsciously or involuntarily be drawn, and from which, by taking ordinary care, the defendant might have protected him. The defendant cannot be heard to say that it did not anticipate that the linemen of the other companies, as well as its own, would do their work in the way that is usual with them. It was bound to know that they might come in contact with its wire; and that it did, in fact, assume the duty of providing against the occurrence of such casualties is shown by its having insulated the wire at all. The fact that it was insulated was calculated to induce reliance upon its safety, and plainly tended to allure or entice such a man as Mason to go upon the bar on which it was stretched. It offered an obvious and seemingly a protected standing place. "There was nothing to warn either child or adult that it was not to be so used." (Schilling v. Abernethy, supra.) It was, therefore, "liable to the incursions of * * * even grown men"—not "from thoughtlessness, accident or curiosity" merely, as suggested in Hydraulic Works v. Orr, supra, but in the prosecution of their legitimate calling. Finally, and upon all the facts, we are of the opinion that, even upon the assumption that the plaintiff's decedent was technically a trespasser, the defendant, under the circumstances, owed him a duty of at least ordinary care. We are not attempting to lay down a rule applicable to all cases; but the principle which, in our judgment, is controlling in the present one is that any person who engages in a highly dangerous occupation, is bound to take such precaution in its pursuit as a sensible man would ordinarily take to avoid

doing fatal or other serious injury to one who comes upon his premises, not as a mere trespasser or positive wrong-doer, but for a purpose in itself lawful, and which the owner had reason to believe might bring him there.

The judgment is affirmed.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

THE NEWARK ELECTRIC LIGHT AND POWER COMPANY, *Plaintiff in Error,* *vs.* HENRY M. GARDEN, administrator, etc., of JAMES A. MASON, deceased, *Defendant in Error.*	*Error to the Circuit Court of the United States for the District of New Jersey.*

Before ACHESON, DALLAS and WALES, J. J.

DISSENTING OPINION BY ACHESON, CIRCUIT JUDGE.

I dissent from the opinion of the majority of the Court, and from the judgment of affirmance.

According to my reading of this record, the following stated facts are conclusively established by the evidence:

James A. Mason was an experienced lineman in the employ of the Pennsylvania Railroad Company, and on the occasion when he lost his life was one of a gang of that company's linemen engaged in removing the railroad company's telegraph wires from an old line of poles owned by the Western Union Telegraph Company to a new parallel line of poles of the railroad company recently erected. One of the Western Union Telegraph Company's poles stood at the southeast corner of Hamilton street and Railroad avenue, in the city of Newark. There were upon the pole ten cross-arms, all carrying wires. The topmost arm belonged to the city of Newark; the second, third and fourth cross-arms from the top belonged to the Western Union Telegraph Compa-

ny, the fifth, sixth and seventh cross-arms from the top belonged to the Pennsylvania Railroad Company, the eighth and ninth cross-arms from the top belonged to a telephone company, and the tenth from the top, or the bottom cross-arm belonged to the Newark Electric Light and Power Company, the defendant below. The bottom cross-arm was a short arm, about four feet in length from end to end. The other cross-arms were considerably longer. The distance from the defendant's cross-arm to the lowest cross-arm of the Pennsylvania Railroad Company could not have been less than six feet.

To facilitate the removal of the railroad company's wires to their new location, that company's linemen put upon the Western Union pole two long temporary cross-arms above the defendant's cross-arm, between it and the lower permanent cross-arm of the telephone company, and at the time Mason was killed he and his fellow linemen were engaged in shifting the telephone wires from their own proper arms to the two temporary cross-arms. In doing this work Mason stood upon the defendant's cross-arm. Immediately before he received the fatal electric shock his legs were astraddle of the lower temporary telephone cross-arm, but he stood with both his feet upon the defendant's cross-arm.

Corbet Aten, a witness for the plaintiff, in response to the question, "And before you heard that exclamation from Mason, and when you saw him have the telephone wire in one hand, where was he standing or sitting, or what was he doing?" answered, "Well, he was standing; he wasn't sitting. He had one leg over the cross-arm next above, you know, and both feet down on this arm where the electric light wires was." And Samuel A. Powell, the foreman of the gang of linemen, a witness for the plaintiff, testified thus with respect to Mason's position:

"Q. Where did he stand? A. On the bottom arm.

"Q. Was that the arm where the electric wires were? A. Yes, sir.

"Q. And was that the point from which he could perform his work? A. Yes, sir.

"Q. The work which you appointed him to perform? A. Yes, sir.

"Q. And did he perform, or attempt to perform, his labor from that position, standing on that bottom cross-arm? A. Yes, sir.

"Q. And where was he when he was killed? A. Well, he was astride of the arm—one arm he had his

> left leg thrown over, the next to the bottom arm—and of course that throwed his both feet on the bottom arm, the four-pin (arm), and he then, of course, was in between two wires, and he was working them to make a reach to the end of this ten pin arm to put the wire onto the knob to make a fastening."

After Mason had gone up the pole, and while standing on the defendant's cross-arm, he was warned by the foreman, Powell, and also by his fellow-workmen, that the defendant's wires were carrying heavy currents of electricity and were dangerous. Once Mason was observed to be actually standing on one of the defendant's wires and was warned off by the foreman. He was repeatedly cautioned against the danger from the defendant's wires. All the foregoing appears from the testimony of the plaintiff's witnesses.

The catastrophe occurred in this wise, as those witnesses state. Three of the railroad company's linemen were on this particular Western Union pole, two of them above Mason. One of the two handed Mason a telephone wire to attach to the outermost knob of the upper temporary telephone cross-arm, and Mason having taken this wire in his right hand, which was ungloved and bare, stretched out his person so as to make the desired attachment, and as he made this movement his left foot came in contact with the end of the defendant's wire, which was on that projection of the defendant's cross-arm upon which Mason then stood; and thus he received the electric shock that killed him. The plaintiff's witnesses who afterwards examined the defendant's wire testified that there were "two bare points" at the end of the wire.

It was shown by testimony which was not directly contradicted, and which practically was unshaken, that the defendant company within sixty or ninety days before the disaster had caused this part of its wire to be carefully and perfectly insulated in the usual and approved way. How and when the "two bare points" were made was not shown.

No usage was proved, nor was positive testimony produced, tending to convict the defendant of negligence or want of due care in not causing its wire to be inspected in the short interval between the insulation in February or March and the date of this occurrence in April.

In my opinion, upon the whole evidence the defendant was entitled to a verdict and the peremptory instruction in its favor asked for should have been given.

Undoubtedly the Pennsylvania Railroad Company's lineman had the right to go up and down this Western Union pole, and while they were in the exercise of this right the defendant owed to them the duty of reasonable care to keep its wires safely insulated. It will be noted, however, that on this occasion the linemen went up the pole securely and all except Mason came down in safety. Mason was not injured while in the exercise of his right of going up and coming down the pole. For his own convenience, without the license, express or implied, of the defendant, Mason saw fit to take possession of the defendant's cross-arm by standing on the same and doing his work therefrom. His work was quite unusual and such as the defendant had no reason to anticipate or provide against. The work he was engaged in involved the removal of all the Pennsylvania Railroad Company's wires to another line of poles, and this occasioned the shifting of the telephone company's wires from their proper cross-arms to two temporary cross-arms which the railroad people improvised. Again, Mason was not only an experienced lineman and as such presumably acquainted with the inherent danger in heavily charged electric wires, even when insulated; but on this occasion he was repeatedly warned of the danger. (It is by no means an improbable supposition that the two minute bare spots at the end of the wire were caused by the action of Mason's boots or the spurs with which he was equipped.) But however this may be, the indisputable fact remains that he voluntarily, without the invitation or license of the defendant, placed himself in a position of danger by standing upon and doing extraordinary work from the defendant's cross-arms. In thus acting, Mason was a volunteer and assumed the risk of the calamity that overtook him. He was, indeed, a mere trespasser. In principle, this case, it seems to me, is not distinguishable from the case of the New York and New Jersey Telephone Company v. Speicher, wherein the Supreme Court of New Jersey held that a telephone company was not answerable to a lineman in the employ of a city, who, in descending one of the company's poles supported himself by one of the lower cross-arms which was insufficient to sustain his weight.

In each of the cases (cited in the opinion of the majority of the Court) of Hydraulic Works Co. v. Orr, 83 Pa., 332; Schilling v. Abernethy, 112 Pa., 437, and Union Pacific Railway Co. v. McDonald, 152 U. S., 262, the injured plaintiff was a child, and, moreover, the circumstances were very different from these which existed here. The defend-

ant here had no reason to apprehend danger to linemen from the situation and condition of its property. In truth, the evidence, I think, demonstrates that the defendant had taken all reasonable care to insure the safety of linemen when ascending and descending this pole. It is my judgment that the defendant had performed its whole duty to Mason and that it is neither legally nor morally responsible for his death.

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JAMES H. McKINNEY, CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1896.

THE NEWARK ELECTRIC LIGHT AND POWER COMPANY,
Plaintiff in Error,

vs.

HENRY M. GARDEN, ADMINISTRATOR, &C., OF JAMES A. MASON, DECD.,
Defendant in Error.

On Petition of The Newark Electric Light and Power Company for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER.

JOHN O. H. PITNEY,
MAHLON PITNEY,
Attorneys and Counsel for Petitioner.

Holbrook Printing House, 11-13 Mechanic Street, Newark, N. J.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

THE NEWARK ELECTRIC LIGHT AND POWER COMPANY,
Plaintiff in Error,
vs.
HENRY M. GARDEN, ADMINISTRATOR, &C., OF JAMES A. MASON, DEC'D,
Defendant in Error.

Brief in support of petition of The Newark Electric Light and Power Company for a writ of certiorari to the United States Circuit Court of Appeals.

The references are to the certified transcript of record of the Circuit Court of Appeals for the third circuit herewith submitted.

The opinion of Dallas, Judge, for the majority of that Court, and the dissenting opinion of Acheson, Judge, are included in and will be found at the end of the transcript of record.

STATEMENT OF FACTS.

This action was brought by the administrator of James A. Mason, deceased, to recover damages for his death on April 26th, 1894, alleged to have been caused by the negligence of the plaintiff in error, and which occurred under the circumstances next stated.

Mason was a telegraph lineman in the employ of the Pennsylvania Railroad Company. On the occasion in

question he was one of a gang of linemen, under a foreman named Powell, working under the personal direction of the Pennsylvania Railroad Company's division operator, Ettinger, engaged in changing the Pennsylvania Railroad Company's line of telegraph wires, running parallel with and near to its main line of tracks in Newark, from an old line of poles, owned by the Western Union Telegraph Company, to a new line of poles then recently erected by the Pennsylvania Railroad Company. (p. 15.)

In order to clear sufficient space in the air for the stringing of these wires on the new poles, it became necessary to shift some telephone wires that were attached to the pole belonging to the Western Union Telegraph Company, situated at the southeast corner of Hamilton street and Railroad avenue. (p. 16.)

This pole had twelve cross-arms on which were strung wires of the Telegraph Company, wires of the Pennsylvania Railroad Company, wires of the Telephone Company, and, on a short cross-arm below the others and several feet distant therefrom, two electric light wires of the defendant. (pp. 16, 51.)

In order to make room through this bundle of wires for the Pennsylvania Railroad Company's wires, the gang of linemen had fastened two new cross-arms on this pole, (p. 22; pp. 50–51), between the large cross-arms and the short lower cross-arm used by the defendant, (p. 17), and the gang of linemen were engaged in transferring the telephone wires from one of the intermediate cross-arms to these new cross-arms. (p. 16.)

Three linemen were on the pole in question—Mason, Roberts and Breckinridge (p. 16); another lineman, Madden, was on a pole about ten feet north of it belonging to the Pennsylvania Railroad Company, to which it was transferring its wires. (p. 51.)

On the ground were several other linemen, together with the foreman and division operator.

The three linemen had been on the pole sometime before the accident occurred. Breckinridge and Roberts had

stood, and at the time of the accident were standing on cross-arms above that of the defendant, and on the other side of the pole. (p. 24.) Mason seemed to have stood all the time he was on the pole on one side or the other of defendant's cross-arm.

When Mason was first on the pole, he was warned by the foreman to be careful of defendant's wires, (pp. 93, 95, 96), which, even from the ground, appeared to be dangerous, (pp. 93, 95), or such as linemen knew carried heavy currents. (pp. 25, 62–64, 77.) After the three linemen were on the pole there was conversation among them, and between them and Madden on the next pole, regarding the defendant's wires, to the effect that they were dangerous, and Madden warned Mason to look out for them. (pp. 55, 56, 57.)

Mason also had warning from Breckinridge, another lineman on his pole, to be careful of the defendant's wires. These warnings were so loud that they were heard by Madden, (p. 56), and by Dawson, who was on the ground sixty feet away. (p. 77.) In spite of these warnings and in spite of the appearance of the wire, and in spite of the fact that the other linemen were doing their part of the work from other cross-arms where there were no dangerous wires, Mason remained on defendant's cross-arm, and in fact was seen by Powell and Madden to be standing on one of defendant's wires. (pp. 24, 46.) He was again warned by Powell of the danger, and requested to take his feet off the wire, and did so. (pp. 24, 56.)

A few minutes afterwards his work was transferred to the other side of the pole, and he changed his position so that he stood on that part of defendant's cross-arm which projected towards the railroad track. That projection of the cross-arm was about two feet or two and one-half feet long; on it were two pins for glass insulators. One was close to the pole and to it was attached one of the defendant's wires; the other was near the outer end of the arm, distant about eighteen or twenty inches from the other pin. No wire was attached to this outer pin. (p.

22.) The space between the pins, which was perfectly clear and free from danger, was about eighteen or twenty inches. (pp. 23, 59.) There was also a space beyond the outer pin free from danger. While standing there he was again warned by Powell to be careful of defendant's wires. (p. 96.)

At the time of the accident Mason was standing on defendant's cross-arm on the north side of the pole facing west, his legs astride the next cross-arm above, his right foot resting on defendant's cross-arm, his left foot also touching it, or swinging free in the air as his body moved. (pp. 17, 39, 46, 54.) While in that position, the telephone wire was handed to him, which he took in his right hand and was apparently about to adjust to the outermost pin on the third cross-arm. (pp. 53, 54.) As he did so his left foot came in contact with defendant's wire, and from that received, apparently, an electric shock through his body, connection presumably being made through the telephone wire in his hand. He had no gloves on his hand, (p. 27), though there were one or two pairs on the ground, (pp. 25, 97), and it is admitted that if he had had a glove on his hand which received the telephone wire, no shock could have been received by him. (pp. 108, 77, 96.)

SPECIFICATION OF ERRORS.

The determination of the majority of the Circuit Court of Appeals was erroneous:

First—In holding that the plaintiff in error owed a duty of care to Mason, although he was a trespasser on its cross-arm. This view is in conflict with the decisions of the Circuit Courts of Appeals for other circuits.

Second—In holding that the plaintiff in error owed any duty of care to Mason under the circumstances of the case.

Third—In holding that there was any evidence of the breach of such duty submissible to the jury.

Fourth—In holding that there was any evidence that the plaintiff in error had reason to believe that Mason might have occasion to be upon its cross-arm, and that a liability to use reasonable care resulted therefrom.

ARGUMENT.

We are aware that applications to this Court for writs of certiorari should not be made, nor the time of this Court be occupied in considering the same, except in exceptional cases, and we assure the Court that the present application is only made because we feel that the majority opinion of the Circuit Court of Appeals is in conflict with the decisions of the other Circuit Courts of Appeals upon fundamental questions of wide application, and if allowed to stand unquestioned and unqualified will work confusion in the administration of justice in the Federal Courts. We also feel that the Circuit Court of Appeals has done great injustice to the plaintiff in error in holding it responsible for an undefined duty of care, for which the opinion of the majority of the Court confesses "there is no specific criterion," adding that the defendant disregarded no determinate provision of the law prescribing what its conduct should have been. Such a precedent must work injustice to every person and corporation that has relations with others, for it convicts them of fault without being able to say wherein they have been guilty, and leaves them entirely to the mercy and sympathy of juries. These considerations seem to constitute the case one of "gravity and importance," and one in which this Court should intervene "in the interest of uniformity of decision." On these accounts we respectfully request the Court's careful consideration of the two opinions of the Circuit Court of Appeals and of the contentions hereinafter urged.

I.

Was any duty of care owing from the plaintiff in error to Mason?

No contract between them was shown, or can be implied from the circumstances. He was, therefore, on its cross-arm at the time of the accident either as a trespasser, a licensee, or by invitation.

If Mason was a trespasser the plaintiff in error owed him no duty except to refrain from willfully injuring him.

If he was a licensee the plaintiff in error owed him no duty except to refrain from setting a trap for him.

If he was there by invitation the plaintiff in error owed him only the duty to warn him of or protect him from dangers unknown to him, but known to the plaintiff in error, or such as the plaintiff in error ought to have known of.

An invitation is only implied where the use of the premises is for the common interest of both parties. Where the benefit from the use of the premises enures only to the benefit of the party using them, a license merely is inferred, but not an invitation.

We contend that these propositions are established by almost unanimous authority, and that they exclude any responsibility by the plaintiff in error in this case.

1. Trespassers.

That no duty, except to abstain from willfully inflicting injury, is owed to one trespassing upon the property of another without the latter's knowledge or consent, has been held in the United States Circuit Court of Appeals for several of the other circuits.

In *Cleveland Railway Co.* vs. *Phillips*, 24 U. S. Appeals, 489 (7th circuit), the Court said: "But where the plaintiff is a wrong-doer or trespasser, or is in the enjoyment of a naked license for his own convenience without any invitation, express or implied, from the owner of the premises, he cannot maintain an action for an injury without averring

and proving that the injury was willfully inflicted, or that it was caused by negligence so gross as to authorize the inference of willfulness. As he was a trespasser, no action will lie against the company for causing his death unless the act of its employees in charge of the train was willful. A trespasser cannot maintain an action where the tort complained of consists of nothing more than the omission to exercise care."

In *St. Louis, &c., Railway Co.* vs. *Bennett*, 32 U. S. Appeals (8th circuit), 621, it was said: "The only duty which a railroad company owes to those who, without its knowledge or consent, enter upon its tracks, not at a crossing or other like public place, is not wantonly and unnecessarily to inflict injury upon them after its employees have discovered them," and numerous Federal cases are cited.

In *Kansas City, &c., R. Co.* vs. *Cook*, 31 U. S. Appeals, 277 (6th circuit), it was held "that as Cook had no legal right to be where he was when the accident occurred, the company owed him no duty except to avoid, after discovering his danger, any wanton or unnecessary injury being done to him."

In *Mitchell* vs. *New York, &c., R. Co.*, 146 U. S., 513, where a lad of sixteen years, with others, got on a coal train of defendant to ride, he sitting on the end on top of the car, his feet hanging over down between the cars, and by a sudden jerk of the cars he fell between two of them and was killed; it was held the railroad company was not liable for damages for his death, although the conductor and brakemen knew he was there and allowed him to ride.

In *Bennett* vs. *Louisville, &c., R. Co.*, 102 U. S., 577, Mr. Justice Harlan says: "It cannot be pretended that Bennett at the time he was injured was in any sense a trespasser upon the premises of the company," virtually

conceding that, if he had been, a perfect defense to the action would have been established.

One walking upon a railroad track which the company has not licensed the public to make use of is a trespasser, and the company is not liable for his death because of a negligent act of the employees unless it was willful.

Palmer *vs.* Chicago, &c., R. Co., 112 Ind., 250.
Gregory *vs.* Cleveland, &c., R. Co., 112 Ind., 385.
Mitchell *vs.* Philadelphia, &c., R. Co., 132 Pa., 226.

A railroad company owes no duty to a trespasser on its tracks until his presence there is discovered.

St. Louis Railway Co. *vs.* Monday, 49 Ark., 257.
Williams *vs.* Kansas City, &c., R. Co., 96 Mo., 275.
State *vs.* Baltimore & O. R. Co., 69 Md., 494.
Baltimore & O. R. Co. *vs.* State, 69 Md., 551.
International & G. N. R. Co. *vs.* Kuehn, 70 Tex., 582.
Norfolk & W. R. Co. *vs.* Harman, 83 Va., 553.
Illinois, &c., R. Co. *vs.* Godfrey, 71 Ill., 500.

2. Licensees.

A licensee is one who uses another's premises, not by virtue of any contractual relation, nor as a trespasser, but merely by the permission or passive acquiesence of the owner. He enjoys the license subject to its concomitant perils. The owner is not bound to protect him from those perils. The only duty is to refrain from willfully injuring him, or setting a trap for him.

Mason was not an employee of the plaintiff in error; he was on its property without its knowledge; by no invitation from it, either express or implied, and engaged in no business that was for the advantage of the plaintiff in error. He was, therefore, at most a licensee. To him it owed no

duty to keep its wires in repair, or to make the place he occupied safe.

In *Crane Elevator Co.* vs. *Lippert*, 24 U. S. Appeals, 176 (7th circuit), the principle is stated thus: "A trespasser who comes upon the lands of another without right cannot maintain an action if he runs against an obstruction or falls into an excavation there situated. The owner owes no duty to a wrong-doer to provide safeguards for his protection. So, also, a licensee who enters on the premises of another by permission only, without any allurement, enticement or invitation being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or excavations. He goes at his own risk, and enjoys the license subject to its attending perils. *The Evansville and Terre Haute Railroad Company* vs. *Griffin*, 100 Ind., 221. *Reardon* vs. *Thompson*, 149 Mass., 267. *Byrne* vs. *The New York Central and Hudson River Railroad Company*, 104 N. Y., 362. This is so, because no duty is imposed by law or contract on the owner or occupant to keep his premises in a safe condition for those who come there solely for their own convenience or pleasure, and who are not either expressly or impliedly invited or induced to come upon them by the purpose for which the premises are appropriated or occupied, or by such adaptation of the place for use by others as might naturally and reasonably lead them to suppose that they might properly and safely enter thereon."

In *Bennett* vs. *Louisville, &c., R. Co.*, 102 U. S., 577, Mr. Justice Harlan says: "Nor is this case like many cited in the books, of mere passive acquiesence by the owner in the use of his premises by others, nor is it a case of mere license or permission by the owner without circumstances showing an invitation extended or an inducement, or, in the language of some of the cases, an allurement held out to him by one of the general public." Again virtually conceding that there would have been no liability under those circumstances.

In the recent case of *Phillips* vs. *Library Company*, 26 Vroom, 307 (1893), the New Jersey Court of Errors and Appeals held that "mere permission to pass over dangerous lands, or acquiesence in such passage for the benefit or convenience of the licensee, creates no duty on the part of the owner except to refrain from acts willfully injurious."

In *Vanderbeck* vs. *Hendry*, 5 Vroom, 467, the New Jersey Supreme Court held that mere permission to pass over dangerous land, or an acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the part of the owner, except to refrain from acts willfully injurious. The premises on which the injury in that case happened were private grounds, used for a lumber yard, on which lumber was piled, leaving passage ways between the piles for the convenience of loading and unloading. The yard was not enclosed, and persons were in the habit of passing through these gangways to go from street to street. The plaintiff, out of curiosity, went into one of the gangways and was injured by the falling of a pile of lumber which had been piled in a negligent manner. The Court held that an action for such injury could not be maintained; that mere permission, or passive license to enter upon lands, relieved a person entering the premises from the responsibility of being a trespasser, but that he enjoyed the license, assuming the ordinary risks of the nature of the place and the business carried on upon it. This doctrine was re-affirmed in *Matthews* vs. *Bensel*, 22 Vroom, 30. It was there held that an owner of land is not bound to fence dangerous machinery on his premises in favor of a mere licensee.

In *Bolch* vs. *Smith*, 7 Hurlst. & N., 736, the workmen in a Government dock-yard were permitted to use for their own accommodation certain paths across it. The contractor, also by permission, erected across one of these paths a revolving shaft connected with certain machinery, covering it partly with planks. The plaintiff, being one of the

workmen in the yard, in going along this path stumbled, and putting out his hand to save himself, his arm was caught by the shaft and lacerated. The jury found that the shaft was not properly fenced, but the Court refused to sustain the action, for the reason that no duty existed requiring the defendant to put a safeguard to his machinery for the protection of a simple licensee.

In *Gautret* vs. *Egerton*, 2 L. R., C. P., 371; S. C. 36 L. J., C. P. 191, the defendants owned a piece of land and a canal intersecting the same, and bridges across the canal communicating with their docks, which land and bridges were used, by the permission of the defendants, by persons going to and coming from said docks. The defendants negligently suffered the bridges to be out of repair and dangerous, and plaintiff's intestate, whilst lawfully passing over said bridges, using them for the purpose of going to the docks, fell into the canal and lost his life; held that there was no cause of action. The Court said that in such case "permission in the absence of any benefit to the person giving that permission, must be taken to be in the nature of a gift, and the general principle is that a giver, in such a case, is not answerable for any injury from such gift *unless he knows at the time the dangerous character of the thing given;*" and again, that "it would be necessary for the plaintiff, in order to make out a cause of action, to show that the intestate who was so permitted to use the said land did not know of the danger which existed, *but that defendants did*, when it might amount to a fraud or deception on their part."

In *Evansville, &c., Railroad* vs. *Griffin*, 100 Ind., 221; S. C., 50 Am. Rep. 783, it was held that "the owner of premises is under no legal duty to keep them free from pitfalls or obstructions for the accommodation of persons who go upon or over them merely for their own convenience or pleasure, even where this is done with his permission. In such cases the licensee goes there at his

own risk, and as has often before been said, enjoys the license with its concomitant perils."

In *Cusick* vs. *Adams*, 115 N. Y., 55, it was held that the owner of premises owes no duty of active diligence to one going thereon without invitation, but simply as a bare licensee, and is not liable for injuries resulting from an omission to keep a structure thereon in repair. The fact that private premises are for the convenience of the owner connected by him with a public highway by a bridge, no portion of which is in the highway, imposes no duty upon the owner to maintain and protect the bridge for public use, and the fact that the bridge is used by the public, not under any agreement with or by permission of the owner, but merely by his sufferance, does not make him liable for injuries to one crossing the bridge for his own convenience or pleasure, caused by its being out of repair. The Court in that case said that the principle is now well settled by repeated adjudication, in this country and in England, that where a person goes upon the premises of another without invitation, but simply as a bare licensee, and the owner of the property passively acquiesces in his going, if an injury is sustained by a mere defect in the premises, the owner is not liable for the accident, for such person has taken all the risk on himself.

In *Metcalfe* vs. *Cunard Steamship Co.*, 147 Mass., 66, a person boarded a ship in search of a surgeon, and on inquiry was directed to his room, and while following the direction was injured by a bag being lowered through a hatch. It was held, that being a mere licensee, if not a trespasser, he could not recover for his injury. The Court found there was no invitation, because the day was not one of those on which the ship was usually opened to visitors; also that the open hatch and the loading of merchandise did not constitute a trap.

In *Heinlein* vs. *Boston R. Co.*, 147 Mass., 136, a person entered a railroad station in the evening to take a train, and

finding the last train had gone remained there several minutes for his own convenience. The usual closing time having arrived, the station master extinguished the lights, and plaintiff was injured while leaving the station in the darkness. It was held that the plaintiff was, at most, a mere licensee and could not recover. The Court remarked, the plaintiff remained in the station for his own convenience, and was therefore to be considered as a trespasser, or, at most, a mere licensee. He remained at his own risk, and, as there was no evidence of invitation nor of willful injury, recovery was denied.

In *Larmore* vs. *Crown Point Iron Co.*, 101 N. Y., 391, an uninvited person went on another's land to secure employment and was injured by the fall of some machinery. The company was held not liable, because plaintiff was a mere licensee, and the negligence, if any, was passive and not active—of omission and not of commission.

3. Invitation.

An invitation may be express or implied. It is only implied where there is an interest common to both parties, or the premises are public. If the benefit is only to the party using the premises no invitation will be implied; only a license.

The rule is clearly expressed by Mr. Campbell in his treatise on negligence, quoted by Mr. Justice Harlan in the case of *Bennett* vs. *Louisville, &c., R. Co., supra*, as follows: "The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it."

No invitation to linemen to stand upon its cross-arm in doing their work can be implied in this case. It was not erected for that purpose, but simply for the purpose of carrying defendant's wires. When it was built there was a space between it and the next cross-arm above of five or six

feet—enough to allow two new cross-arms between, and defendant could have had no idea that anyone would stand on it to work on the wires above; in fact, this was impossible until the new cross-arms were attached.

If Mason had a lawful occasion to work upon the poles in question, he could have supported his weight by spurs in the pole; or on a temporary platform made for the purpose; or by means of a ladder. That no invitation to use the cross-arm of the plaintiff in error for that purpose can be implied is established by the case of *The New York and New Jersey Telephone Company* vs. *Speicher*, decided by the New Jersey Supreme Court, June 15th, 1896, and not yet reported. (A copy of the opinion is annexed to this brief.) In that case a telephone company used the lower two cross-bars attached to a telegraph pole to carry its wires. The city of Jersey City used the topmost cross-bar attached to the same pole to carry the wires of a fire alarm. A lineman in the employ of the city, in descending the pole, supported himself by one of the lower cross bars which gave way with him, causing him to fall. Held, that assuming that the Telephone Company invited the agents of the city to use the pole for the purpose of putting up or repairing the city wires, it owed no duty to them to maintain the cross-bars (the purpose of which is to carry wires) of sufficient strength to support them in ascending or descending the pole.

The Court says: "Assuming that the Telephone Company invited Speicher to mount and descend the pole in discharging his duties to the city in regard to its wires, what did it invite him to make use of in going up and coming down? Clearly, it would be held to the duty of reasonable care as to the strength and firmness of the pole to carry the wires and the workmen engaged in arranging and repairing them.

"But the sole object of the cross-bars is to carry the wires. He who maintains the cross-bars does it for that purpose and his duty is thus limited. It is not perceived how his duty in that respect is extended by proof that

linemen in climbing usually lay hold of and rely upon the cross-bars for support in whole or in part. That custom is not, in this case, brought home to the knowledge of the Telephone Company, but if it were, it could not operate to compel them to make cross-bars intended for one purpose, sufficiently strong for another purpose for which they were never intended. No invitation to use the cross-bars can be deemed to be extended to the lineman. When, therefore, a lineman makes use of a cross-bar in climbing, he steps beyond the limit of his invitation, and he who invited him to climb up the pole has no liability for any resulting injury."

In *Flood* vs. *Western Union Telegraph Company*, 131 N. Y., 603, defendant's lineman, while working on one of its poles, leaned his weight on one of the cross-arms so that it broke, causing him to fall and resulting in his death.

Earl, Chief Justice, said: "The cross-arms on telegraph poles manifestly from their usual size and strength are not intended to bear the whole weight of any person."

If the cross-arms were not built nor adapted to bear the weight of linemen, no invitation to so use them can be implied. It will not do to say Mason might have been injured while passing them—the fact is he was not.

The criterion of liability upon implied invitation is well stated by Mr. Justice Depue, of the Court of Errors and Appeals of New Jersey, in the case of *Phillips* vs. *Library Company*, 26 Vroom, at page 315, as follows: "The gist of the liability consists in the fact that the person injured did not act merely on motives of his own, to which no act or sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced

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in, but was in accordance with the intention or design for which the way or place was adapted and prepared or allowed to be used."

Certainly there can be no *invitation* to so use them implied in this case.

If there were no invitation in this case, then the plaintiff in error was liable only for willful injury or for setting a trap. There is no pretense of the former, and the Court of Appeals distinctly finds that there was no trap.

The opinion of the majority of the Court in this case upon this point is rested upon the authority of two Pennsylvania cases, *Hydraulic Co.* vs. *Orr*, 83 Pa. St., 332, and *Schilling* vs. *Abernethy*, 112 Pa. St., 437, and some remarks in *Union Pacific Railway Co.* vs. *McDonald*, 152 U. S., 262. The attention of the Court is respectfully called to the fact that in each of these cases there were the elements of the plaintiff being an infant, knowledge on the part of the defendant that the premises were dangerous, reason to apprehend that the plaintiff, among others, would come upon the dangerous premises, and under all the circumstances a virtual finding that the defendant had set a trap on his premises. And in addition, in the McDonald case, the defendant was under an express statutory duty to fence the dangerous premises, and for years had neglected to do so, although knowing they were dangerous. It is submitted that *dicta* from cases having these elements should not control a case where all are absent.

The Circuit Court of Appeals held that plaintiff in error had reason to believe that Mason might have occasion to be upon its cross-bar, and bases this finding upon the evidence of Powell (page 17) that Mason was doing his work the same as any other man would do it that worked at the business.

Upon reading the question to the witness and his complete answer, it will appear that he was not asked as to the *place* where Mason stood, but only as to the *manner* in

which he performed his work while there. The record is thus: "Q. Did you notice *how* he performed his work? A. Yes; he done it as *well* as any other man; the same as any man would do it that worked at the business." Evidently referring to the manner and not the place, and intending to rebut any implication that he was careless in the manner of doing his work.

It is respectfully suggested that the Court misapprehended the purport of the testimony referred to, and that the inference therefrom that plaintiff in error knew that linemen were accustomed to use cross-arms in the manner Mason did, and therefore had reason to apprehend its cross-arm would be so used in future, is unsupported by the testimony, and there is no evidence in the case of any such customary use, or of any knowledge on the part of plaintiff in error that the cross-arm was likely to be so used.

Furthermore, as is well pointed out in the dissenting opinion, the cross-arm to which Mason was attaching the wire was newly placed there, and at the time of the last visit of the company's linemen it was not there, and in the condition in which he left the pole there was a clear space of over six feet between the company's cross-arm and the next arm above, so that it was impossible for any linemen to do work upon the upper arm vhile standing on the company's arm. Certainly the company could not have anticipated that any such work would be attempted.

Furthermore, on this point, mere knowledge that persons might possibly frequent one's premises does not amount to an invitation, raising the duty of reasonable care for their safety, but only raises the duty of guarding them against dangers *known to the owner*.

Knowledge that others may come upon the owner's premises can impose a duty no higher in degree than that which is imposed by knowledge combined with permission, express or implied. The duty owing to a licensee is founded on both knowledge and permission, but the extent of that duty, according to well established principles, is

only that a trap shall not be set for the licensee. Therefore, the duty arising out of mere knowledge that another may come on one's premises can be no greater than that owing to a licensee, namely, not to set a trap for him. Setting a trap for him involves knowledge of the danger. Therefore, unless the owner knows, not only that another will come upon his premises, but also that they are dangerous, he cannot be held liable to an uninvited licensee.

It is therefore respectfully submitted that in order to recover it was necessary for the plaintiff below to prove that the company knew or had reason to know that the place was dangerous. That element of knowledge was present in all the cases cited in the opinion of the majority of the Court of Appeals, including the case of *Union Pacific Railway Co.* vs. *McDonald*, in this Court.

If such knowledge was lacking in the proofs in this case, it is therefore distinguishable from those last mentioned.

In this case it is not pretended that plaintiff in error knew of any defects in its wires at the point in question, or had any reason to believe there could be any defect. Hence, assuming it had reason to believe linemen might come upon the premises, it is not liable.

The Trial Judge charged the jury that the plaintiff in error was bound to inspect its wires, but the opinion of the majority in the Court of Appeals bases no reliance upon this, because it appeared that the Trial Judge's remarks on that subject were founded on a mis-statement of the evidence, which he afterwards corrected, and the opinion of Judge Acheson of the Circuit Court of Appeals shows there was no such duty, because by undisputed proof the wire had been thoroughly insulated within six weeks of the accident.

II.

No negligence on the part of the plaintiff in error was shown.

The undisputed evidence showed that in respect to its wires it had discharged the full duty it owed to any person, no matter what his status with reference to it. The wire used by the defendant was the best wire made for the purpose, and secured the most perfect insulation that could be used out of doors in places exposed to the weather, (pp. 102, 103, 105.) The necessary joint at the place in question had been insulated in the usual and only way known in the arts, by the best of insulating tape (p. 103), applied generously in the best manner known, and left by defendant's workmen, at the time of construction in July, 1893, in the most perfect condition it was possible to be put in (pp. 98, 99.) In the construction and erection of the wire at the point in question, the defendant, by the undisputed evidence, had discharged its full duty in the most ample manner possible. About six weeks before the accident, or in March, 1894 (p. 100), the wires had been found in good condition, and on account of the lowering of a cross-arm the tape had been taken off, and new tape put on in the most careful and thorough manner. Defendant had again discharged its full duty.

If those were the only facts in the case, and an accident had happened at that point, the defendant could not have been liable to anyone, unless as a guarantor, which is not claimed.

The only opposing evidence is found in the condition of the piece of wire produced by the plaintiff showing two bare spots. There is no evidence showing that they were caused by any act or neglect of the defendant. They may have been produced by abrasion by the linemen passing and repassing and striking the wires with their spurs, or abrading it with their appliances, or by wires being drawn up or down, or in adjusting the new cross-arms.

There was no evidence to make the defendant responsible for them. The other linemen at the time told the county physician that they thought Mason's spur must have struck the wire (p. 82.)

In *Flood* vs. *Tel. Co.*, 131 N. Y., 603, an action for death from breaking of cross-arm, it was held the company had performed its full duty to its employee if it had originally constructed its pole and cross-arms with due care.

As to defendant's duty to inspect its wires, in addition to what is said above on the subject, it is submitted that whatever its duty of inspection towards persons using the highway, there was no such duty towards linemen who might occasionally mount the pole. They are familiar with wires and just as able to detect and avoid defects, as an inspector would be. As they are the only class of men who could have occasion to mount these poles, it would be a hard rule to require, for their benefit, frequent close inspections, involving sending an inspector up every pole on which the company had a wire.

In *Flood* vs. *Tel. Co.*, 131 N. Y., 603, Chief Justice Earl said: "It is the obvious duty of every lineman, before going upon one of these arms, many feet above the earth, to inspect it for his own safety;" and, as to inspection, continued: "He (intestate) had all the opportunity which any inspector could have to know the condition of this arm, having frequently inspected that portion of the defendant's line where this arm was. He saw it when he went upon it, and careful inspection was the first thing then suggested to him. He knew that he was in a place of danger, and thus was bound, before trusting his weight upon the arm, to examine it to see if it was sound and probably adequate to support him."

So, in this case, Mason knew from observation, and the warnings of his fellow workmen, that these wires were dangerous. He was bound to look for himself to see if they were safe for him to be near. If he did not, he was negligent. If he did, but could not detect any defect, neither could an inspector, and an inspection would not have averted the injury.

But, even supposing there was a duty to inspect, it was fully discharged by defendant in this case. The line was constructed in July, 1893, in the most approved method known, and in February, or more probably March, 1894, only a few weeks before the accident, the wires were found by defendant's lineman to be in good condition, and were so left by him; under those circumstances there was nothing to lead defendant to believe or feel that they would become dangerous between that time and the time of the accident, and therefore nothing to require inspection. To require another inspection in that short interval of time, while nothing seemed to demand it, was virtually making defendant a guarantor, and was wholly beyond reasonable care, which is the most that can be required of defendant.

It is evident from the descriptions of the occurrence that the injury to Mason was an accident. Before it occurred he was standing in a perfectly safe position on defendant's cross-arm, and was free from danger. While turning his body around to grasp the telephone wire and reaching out to attach it to a remote pin, the position of his body changed so that he lost perfect control of his left foot and it slipped from the safe position in which it had been, along the cross-arm to defendant's wire, and the shock was received, (pp. 39, 46, 47, 54, 55.) This slipping renders the injury an accident, for which defendant is not responsible.

In *Buckly* vs. *Guttapercha Company*, 113 N. Y., 540, a boy working around a machine slipped, threw out his hand to save himself from falling and thrust it into the cogs of the machinery and the hand was crushed. It was held that an action to recover damages for the accident was not maintainable. The Court said he was not injured because he did not know that the cogs were dangerous, but the injury happened because he slipped and fell, and instinctively threw out his hand to recover himself. His falling was a mere accident. His injury did not come from

any ignorance of the machine, or of the dangers to which he was exposed, but it came solely from the accident.

See also *Kelly* vs. *Bennett*, 132 Pa. St., 218, where relief was denied to a person injured by slipping on the sidewalk and striking his hand on a pointed fence about an areaway.

III.

The Circuit Court of Appeals erred in holding that the question of Mason's contributory negligence was properly submitted to the jury. The facts upon which that negligence was predicated were all developed from witnesses for the plaintiff below and was uncontroverted. It is submitted they established conclusively such contributory negligence as required the Court to direct a finding for the defendant below, the plaintiff in error here.

The wires were such as all linemen know to be dangerous wires, (pp. 62, 63, 64, 77.) Mason was repeatedly warned that they were dangerous. When seen to be standing on one of defendant's wires he was warned of the danger of his position and stepped off the wire (pp. 24, 25), thereby acknowledging that he knew it was dangerous and that it was careless for him to be near it. In spite of all this he persisted in keeping a position where he was likely to come in contact with defendant's wires, although there were cross-arms above, which on the other side of the pole Roberts and Breckinridge were using, and refused or neglected to wear rubber gloves, which, it is undisputed, would have prevented the accident. His conduct was so reckless that Ettinger, Powell and the other linemen noticed it, and reproved him, and his fellow linemen found safer places from which to do their similar work.

Furthermore, there was sufficient space on defendant's cross-arm for Mason to stand in safety if he had been careful of the position of his foot.

All these circumstances plainly show that Mason was careless—even reckless—that he disregarded all warnings—

that he neglected to take such precautions for his safety as were at hand; that to suit his own convenience he unnecessarily assumed the known dangers which could easily have been avoided, and, as a result, suffered the injury.

The plaintiff should have been non-suited or a verdict directed for the defendant at the close of the case. The fact is, that like all men in similar walks of life, he had become so accustomed to being in places of danger that he took unnecessary risks. It was easier to take chances than to guard against danger, and, as occasionally happens, he suffered the consequences.

In *Tucker* vs. *The Baltimore and Ohio Railroad Co.*, 8 U. S. Appeals, 491, plaintiff, who had business in the freight yard of defendant, was injured by a passing train, while he was walking dangerously near the main track, although there was room to pass safely between the tracks if he was careful. At the close of the plaintiff's case a verdict for the defendant was directed, and sustained on appeal. At page 495, the Court says: "Apart from the fact that there is no evidence of contract relation between the plaintiff and the defendant, as passenger or otherwise, it is clear that the plaintiff, perfectly familiar with the locality, in a place of known danger, a railroad yard, in which locomotives were constantly passing, walked on or dangerously near to a track, where, by his own admission, a man could pass safely between the tracks if he walked carefully. His injuries were the result of his own act. He cannot hold the defendant responsible for them."

In this case, Mason was in a place of known danger. There was a space on the cross-arm, where he stood, of eighteen inches beyond defendant's wires, and accordingly room enough for him to stand there without coming in contact with it. If he stood there carelessly, or assumed a position where he could not control his foot and prevent its slipping against the wire, he was guilty of negligence, and, under the case last cited, there should have been a verdict directed for the defendant; much more was

defendant entitled to have the jury charged according to its second request.

In *Baltimore, &c., R. R.* vs. *Depew*, 40 Ohio St., 121, the Court said the plaintiff "voluntarily and needlessly put himself in a highly dangerous place; a place, however, where he might go without incurring any liability as a wrong-doer, but where his own safety required his attention to the surroundings without one moment's interruption. If he risked himself in such a place he must take whatever injury came from his own want of attention to danger."

In *City of Erie* vs. *Magill*, 101 Penn. St., 616; S. C. 47, Am. Rep., 739, it was held that one who attempts to walk over a sidewalk which he knows to be dangerous on account of snow and ice, when he could have avoided it by a slight detour, is guilty of contributory negligence, *per se*.

IV.

In conclusion, it is respectfully submitted that the principles laid down by the Circuit Court of Appeals are erroneous and at variance with the principles established in other Circuit Courts of Appeals, and have resulted in great injustice to the plaintiff in error in this case, and are likely, unless reviewed and modified in this Court, to result in injustice in innumerable cases arising out of similar circumstances, and in view of the difference of opinion between the Judges in the Circuit Court of Appeals in this case, this Honorable Court should require the record to be sent up, so that an opportunity may be had for a review of this case in this Court.

JOHN O. H. PITNEY,
MAHLON PITNEY,
Attorneys and Counsel for the Petitioner and Plaintiff in Error.

APPENDIX.

NEW JERSEY SUPREME COURT.

THE NEW YORK AND NEW JERSEY TELEPHONE COMPANY,

vs.

MAHLON SPEICHER.

A Telephone Company used the lower two cross-bars attached to a telegraph pole, to carry its wires. The city of Jersey City used the topmost cross-bar attached to the same pole to carry the wires of a fire alarm. A lineman in the employ of the city, in descending the pole, supported himself by one of the lower cross-bars which gave way with him, causing him to fall. *Held*, that, assuming that the Telephone Company invited the agents of the city to use the pole for the purpose of putting up or repairing the city wires, it owed no duty to them to maintain the cross-bars (the purpose of which is to carry wires) of sufficient strength to support them in ascending or descending the pole.

ON ERROR, &c.

Speicher, the defendant in error, while in the employ of Jersey City as a "lineman," climbed a telegraph pole to do some work upon wires of the city fire department, which were carried by the topmost of three cross-bars. The lower two cross-bars carried wires of the New York and New Jersey Telephone Company, the plaintiff in error. When Speicher descended the pole he took hold of one of those cross-bars, which gave way and he fell.

Argued at February Term, 1896, before the Chief Justice and Justices Dixon, Garrison and Magie.

Messrs. Depue and Parker, for plaintiff in error.

Mr. Samuel Kalisch, for defendant in error.

The opinion of the Court was delivered by Magie, *J.*

The only assignments of error which need be considered are those based on the exceptions to the refusals to non-suit and to direct a verdict for defendant below. These present

the question whether the evidence established a liability to Speicher on the part of the Telephone Company.

It was conceded that there was no contractual relation between them, for he was the employee of the city and not of the Telephone Company.

Proof that the pole from which Speicher fell had been erected by the Telephone Company or was owned by it, and that it was maintained in a public street upon condition that the topmost cross-bar should be used by the city to carry the fire-alarm wires, might justify an inference that the Telephone Company invited the city's agents to use the pole and that cross-bar in stringing, repairing and caring for those wires. The argument for Speicher assumes that there was such evidence. I find it difficult to discover it in the bills of exception, for those show that the pole was erected by another company, and fail to show that the Telephone Company have any property or possessory right in said pole, except that they support their wires on the lower two cross-bars.

But if it be assumed that the Telephone Company is shown by the evidence to have sustained to Speicher the relation that one sustains to another who has been invited to come upon his premises, the duty devolving upon the former is only to take reasonable care that what the other is to use is reasonably safe for such use. If the visitor is invited to use a path, for example, his invitor will not be liable for an injury sustained by the visitor at other places to which he has gone without invitation.

Phillips *vs.* Library Co., 26 Vr., 307.

Assuming that the Telephone Company invited Speicher to mount and descend the pole in discharging his duties to the city in regard to its wires, what did it invite him to make use of in going up and coming down? Clearly, it would be held to the duty of reasonable care as to the strength and fitness of the pole to carry the wires and the workman engaged in arranging and repairing them.

But the sole object of the cross-bars is to carry the wires. He who maintains the cross-bars, does it for that purpose and his duty is thus limited. It is not perceived how his duty in that respect is extended by proof that linemen in climbing usually lay hold of and rely upon the cross-bars for support in whole or in part. That custom is not, in this case, brought home to the knowledge of the Telephone Company, but if it were, it could not operate to compel them to make cross bars intended for one purpose, sufficiently strong for another purpose for which they were never intended. No invitation to use the cross-bars can be deemed to be extended to the lineman. When, therefore, a lineman makes use of a cross-bar in climbing, he steps beyond the limit of his invitation, and he who invited him to climb up the pole has no liability for any resulting injury.

It results that it was error to permit the jury to consider whether the Telephone Company took reasonable care to have the cross-bar safe, and there should have been a direction for a verdict for the company, on the ground that it owed no duty to Speicher in respect to the cross-bar.

The judgment must be reversed.

A true copy.

BENJ. F. LEE,
Clerk.

166-7/22780

APR 17 1897
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

THE NEWARK ELECTRIC LIGHT AND POWER COMPANY,
PLAINTIFF IN ERROR,
v.
HENRY M. GARDEN, ADMINISTRATOR, &c., OF JAMES A. MASON, DECEASED,
DEFENDANT IN ERROR.

On Petition of The Newark Electric Light and Power Company for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

NAAR, DAY & NAAR, Printers and Stationers, Trenton, N. J.

IN THE

Supreme Court of the United States.

October Term, A. D. 1896.

THE NEWARK ELECTRIC LIGHT AND POWER COMPANY,
Plaintiff in Error,
v.
HENRY M. GARDEN, ADMINISTRATOR, &c., OF JAMES A. MASON, DECEASED,
Defendant in Error.

Brief in reply to the petition of the Newark Electric Light and Power Company for a writ of certiorari to the United States Circuit Court of Appeals.

The rule of this Court is that a writ of certiorari will not be allowed in cases in which the opinion of the Circuit Court of Appeals is based upon sound legal principles.

The facts of the case are stated by Judge Dallas in the majority opinion, and there is no need to recapitulate them. The question is, upon the facts there stated, has the law been correctly applied?

The majority decide that Mason, the plaintiff's decedent was not a *trespasser* upon the cross-arm of defendant; they say that if it could be "unqualifiedly asserted that, at the time and place of the accident, Mason was wrongfully upon the separate property of the defendant, but

one conclusion could be reached; for the law is well settled that, in general, the right to keep his own property in such condition as the owner may see fit is not restricted by any requirement to guard against its causing injury to one who, without invitation, actual or apparent, but as a bare volunteer or mere trespasser, intrudes upon it." * * * * * Again they say "he was not a trespasser upon the cross-arm of the defendant." The rationale of the majority opinion was that the defendant corporation "had assumed the duty of providing against the occurrence of such casualties by its having insulated the wire," and that any person "who engages in a highly dangerous occupation is bound to take such precaution in its pursuit as a sensible man would ordinarily take to avoid doing fatal or other serious injury to one who comes upon his premises, not as a mere trespasser or wrongdoer, but for a purpose in itself lawful, and which the owner had reason to believe might bring him there."

It is submitted that there is no jar or discord between the principles thus announced in the Circuit Court of Appeals and those of this Court.

The decision of the Circuit Court of Appeals is in harmony with well decided cases in other jurisdictions:

In the case of *Illingsworth v. Boston Elec. Co., 161 Mass., 583,* the Supreme Court of Massachusetts decided in a case where the same conditions were present as in the case at bar, that

"When two business corporations, or two persons under some agreement between themselves, use the same structures owned by one of them, as supports for separate lines of wires used by each other, for the transmission of dangerous currents of electricity, what is the duty at common law which each owes to the other in regard to the care each must take to have its wires in a reasonably safe condition at or near the structures where the servants of the other have occasion to go, in the usual course of business, and where they must come near to or in contact with the wires? Such servants, when so employed are

more than mere licensees, taking advantage, for their own benefit or that of their employer, of the passive acquiescence of the licensor. If they are licensees at all, the license until it is revoked is coupled with an interest. The two corporations, or persons, have in a sense, a common interest in the maintenance and use of the structures to which the wires of each are attached, and each, we think, should be under the same obligation to the other as persons having common rights in a place or passage way are under to one another, not negligently to place a dangerous substance on the common territory, where it reasonably may be anticipated that others having common rights, may be injured by it. The purpose for which the structures are used renders some danger from electrical currents inevitable, but the danger ought to be made as small as practicable by the exercise of reasonable care.

In the absence of any agreement on the subject, other than what is involved in the permission of the owner of the structure to the other, to use them in common for the support of electric wires on paying some compensation, we are of the opinion that the duty of the owner of the structures is to exercise reasonable care in seeing his wires are kept, so far as is practicable, in a safe condition at such places as the servants of the other are expressly or impliedly licensed to go, in performing their duties with reference to the wires attached to such structures.

Under this rule, there was evidence for the jury that the defendant was negligent in leaving two joints of its wires without insulation, within twelve or fifteen inches of the frame, on which the plaintiff in the course of his duty of a person employed in the fire alarm service of the city of Boston was required or expected to go."

The same principle was applied in the case of *Clements v. Electric Light Co., 44 La. An., 692:*

"The first requirement of the plaintiff was to show the existence of a duty which they alleged had not been performed, having shown this, they must show a failure to

perform the duty, and thus establish negligence on the part of the defendant.

"It is an affirmative fact, the presumption being until the contrary appears, that every person will perform the duty enjoined by law or imposed by contract.

"The wire of the defendant was spliced and was not insulated as required by the ordinance.

"It passed over a roof to which people in adjoining rooms had access, and where in the course of time mechanics must go to make repairs, or laborers to sweep off or clean the roof.

"It was the duty of the company, independent of any statutory regulation, to see that their wires were safe for those who, by their occupation, were brought in close proximity to them.

"The deceased was lawfully on the gallery roof; he was engaged in a service that necessarily required him to run the risk of coming in contact with defendant's wires, either of stepping over or going under them. The wires were visible and to all appearances were safe.

"The great force that was being carried over the wire gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. *It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact.* He had a right to believe they were safe and that the company had complied with its duties specified by law. The defect was hidden and the insulating wrapping was defective. It is certain had it been properly wrapped Clements would not have been killed. His death is conclusive proof of the defect of the insulation and the negligence of the defendant."

In the case of *McLaughlin v. Louisville Electric Light Co., 37 S. W. Rep., 851,* the Court of Appeals of Kentucky held:

"The evidence in this case conduces to show that appellant was at work at his regular trade, and was where

he had a right to be, and the joint of the wire, being apparently insulated, was to some extent, at least, a guaranty that there was no danger; but independent of that fact, the situation of appellant, his work in hand, and the proximity of the wire were such that he might without negligence have thoughtlessly taken hold of the wire, because he seemed to need support; and, besides, it was hardly to be expected that the current was on the wire about noon, the wire being used wholly to supply incandescent lights or lamps. It seems clear to us that appellee should have been required to have had perfect protection on its wires at the point and place where appellant was injured. The fact that it was very expensive or inconvenient is no excuse for such failure. Very great care might be sufficient as to the wires at points remote from public passways, buildings or places where persons need not go for work or business; but the rule should be different as to points where people have the right to go for work, business or pleasure. At the latter points or places the insulation or protection should be made perfect, and the utmost care used to keep it so."

The decisions in these cases proceed upon the same principles—that persons owning and operating dangerous agencies must exercise reasonable care to protect those who are likely to be brought in contact with them by reason of their employment.

The English decisions in support of the opinion of the majority are

Corby v. Hill, 4 C. B. (N. S.), 556;

Indermauer v. James, L. R., 2 C. P., 213.

Parry v. Smith, 4 C. P. D., 325–327, wherein the court said: "The plaintiff's right of action was founded on a duty, which, I believe, attaches in every case where a person is using, or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to bystanders. To support such a right of action there need be no privity between the party injured and him by whose breach of duty the

injury is caused; nor any fraud, misrepresentation or concealment; nor need what is done by the defendant amount to a public nuisance. It is strange there is no direct authority on this point."

Nor is the decision in this case in disharmony with that of *Bennet v. Railroad Co., 102 U. S., 577*, but on the contrary, the similarity between them is striking. In each case the defendant held out that the injured persons might use the locality where the accident occurred with safety. The defendant undertook to make these wires safe by insulation, whereby the decedent was induced to risk the consequences of contact.

In the case of *Felton v. Aubrey, 43 U. S. App., 278-295*, the court draws the distinction between the cases in these words:

"It seems to us that many of the American cases which we have cited fail to draw the proper distinction between the liability of an owner of premises to persons who sustain injuries as a result of the mere condition of the premises, and those who come to harm by reason of subsequent conduct of the licensor inconsistent with the safety of persons permitted to go upon his premises, and who, he was bound to anticipate, might avail themselves of his license. This distinction seems to be sharply drawn in the case of *Corby v. Hill*, and is a distinction which should not be overlooked."

The record in this case shows that the pole was the Western Union's; that the wires belonged to the defendant, but the record is wholly destitute of any evidence of ownership by defendant of the cross-arm. The evidence in the case on this point is found in the admission of counsel (*Record, page 79*) that the wires belonged to defendant. The defendant was using the cross-arm for stringing wires, and in doing so, kept his wires in an imperfect state of insulation. The decedent had his legs astride of his employer's cross-arm, and decedent's pendulous legs accidentally came in contact with the

uninsulated spot on defendant's wire, *which was four to six inches from the pole.*

The question in this case is not what duty the defendant corporation owed decedent in respect to the strength of the cross-arm, but whether by insulating its wires it did not invite and allure decedent to risk contact with them; and whether the apparent insulation of the wires was not an assurance to decedent that there was no danger in barely touching them or in working in propinquity to them.

The record shows that decedent could perform his work in no other way; that he was doing usual work in the accustomed way; the conclusion, therefore, must be that the privilege of the employers of decedent of stringing their wires upon the cross-arm carried with it as an incident the right to use the pole in the ordinary way to enjoy this privilege, and the defendant corporation violated its duty in placing a dangerous agency thereon, so that an innocent employee in the performance of his master's work was mortally wounded. This duty is independent of that of maintaining a cross-arm of sufficient strength to bear the weight of one's body, and does not conflict with the decisions in the *Flood* nor the *Spicer* cases, cited by the petitioner.

See also *Mather v. Rillston, 156 U. S., 391-399; Bronson v. LaBrot, 81 Ky., 638; Barry v. Railroad Co., 92 N. Y., 289-292; Powers v. Harlow, 53 Mich., 507; Harrison v. Railroad Co., 45 Oh. St., 11.*

Judge Acheson dissents from the opinion of the majority of the court because decedent, without the invitation or license of the defendant, placed himself in a position of danger upon the defendant's cross-arm, and that he was a mere trespasser. This opinion is at variance with the *Illingsworth, Clements* and *McLaughlin* cases, above cited, and plainly in discord with the *Bennet* case, as well as *McDonald v. Railroad Co., 152 U. S., 262.*

The questions of negligence and contributory negli-

gence were for the jury and cannot be reviewed upon a writ of error. It is sufficient to say that there was positive evidence that the defendant's wires were in a bad condition, and that their condition at the time of the accident was inconsistent with the evidence of defendant's employees as to the care bestowed upon the wires.

The case was twice argued in the Court of Appeals as well as on a rule to show cause allowed by the late Judge Green, at *nisi pruis*, and this petitioner has had the benefit therefore of having its case reviewed by a tribunal constituted by Congress for that purpose, and unless their decision is manifestly at variance with the well settled principles of the common law, no further delay should be accorded to petitioner, and the writ asked for should be refused.

HENRY M. GARDEN,
Respondent.